IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JERRY VALDIVIA, et al.,

Plaintiffs,

vs. **No. CIV S-94-671 LKK/GGH**

ARNOLD SCHWARZENEGGER, et al.,

Defendants.

_____/

FIFTH REPORT OF THE SPECIAL MASTER ON THE STATUS OF CONDITIONS OF THE REMEDIAL ORDER

Background

On May 2, 1994, the lawsuit now known as *Valdivia vs. Schwarzenegger* was filed. The Court certified the case as a class action by order dated December 1, 1994. On June 13, 2002, the Court granted partial summary judgment in favor of the Plaintiffs. On July 23, 2003, the Court ordered the Defendants to submit a remedial plan, with specific guidance regarding "…a prompt preliminary probable cause hearing that affords the parolee rights provided by *Morrissey*, including notice of the alleged violations, the opportunity to appear and present evidence, a conditional right to confront adverse witnesses, an independent decision-maker, and a written report of the hearing."

On March 8, 2004, the Court entered the Stipulated Order for Permanent Injunctive Relief ("Permanent Injunction") containing the agreed-upon elements of the

settlement terms. On July 1, 2004, the Defendants submitted a variety of policies and procedures to the Court. On June 1, 2005, this Court signed a Stipulated Order Regarding Policies and Procedures for Designating Information as Confidential. On June 8, 2005, the Court filed an order finding violation of the Permanent Injunction regarding remedial sanctions. On August 31, 2005, the Court issued an Order concerning parolee attorney access to information in clients' field files.

On August 18, 2005, a Stipulation and Amended Order Re: Special Master Order of Reference was entered; on December 16, 2005, an Order appointing Chase Riveland Special Master was entered; and on January 31, 2006, an Order was entered appointing Virginia Morrison and Nancy Campbell as Deputy Special Masters.

The Special Master filed his first report on September 14, 2006. Subsequently, the Court issued an Order on November 13, 2006 requiring improvements to Defendants' information system and self-monitoring mechanisms. On April 4, 2007, the Court entered a Stipulation and Order Regarding Remedial Sanctions. The second Special Master's report was filed on June 4, 2007 after receiving concurrence from the Court that the report would be delayed.

The Court entered a Revised Stipulated Protective Order Regarding Parolee Defense Counsel Access to Witness Contact Information and Certain Mental Health Information on June 11, 2007. On September 28, 2007 and October 22, 2007, the Court issued Orders determining that interstate parolees and civil addicts were not part of the *Valdivia* class.

The third Special Master Report was filed with the Court on November 28, 2007, and an Order issued by the Court on January 15, 2008 directed the Defendants to address

due process for parolees who appear, either in the judgment of their attorneys or defendants' staff, too mentally ill to participate in revocation proceedings.

The Special Master filed a Report and Recommendation Regarding Motion to Enforce Paragraph 24 of *Valdivia* Permanent Injunction on February 8, 2008 and the Court adopted the recommendations in an Order issued March 25, 2008. That Order is on appeal, but a stay was denied by both the district and appellate courts. The Special Master filed his fourth report on April 28, 2008. Granting Plaintiffs' motion, this Court ordered timely access to inpatient psychiatric hospitalization on August 8, 2008.

Special Master Activities

Since the filing of the Fourth Report of the Special Master on the Status of Conditions of the Remedial Order, concentration remained on the implementation of the remedial sanctions plan, and a plan regarding mentally ill parolees who are unable to participate in revocation hearings due to their mental illness.

The Special Master's team instituted monthly conference calls with CDCR, which assisted in a more free flow of information concerning developments in the case and work undertaken. The team observed Deputy Commissioner trainings and met with Plaintiffs about their concerns. The Special Master's team conducted meet and confer sessions regarding decision review and the development of a plan for providing due process for mentally ill parolees unable to participate in revocation proceedings. The team participated in extensive briefings concerning the capacities of the Defendants' updated data system and that of the contract attorney panel, and received and reviewed various draft policies and plans. The team toured remedial sanctions programs, including

a Community-Based Coalition and several ICDTP programs, as well as observing a presentation by The Center For Effective Public Policy regarding the decision matrix. The Special Master also assisted in mediating decisions regarding monitoring of the community-based ICDTP programs.

During this term, the parties were asked to submit to the Special Master's team their priorities. The Plaintiffs submitted the following:

1. Staffing under Section V of the *Valdivia* Permanent Injunction
2. Confrontation rights under ¶ 24 of the *Valdivia* Permanent Injunction
3. Expedited probable cause hearings and timeframe for attorney appointment
4. Remedial sanctions
5. Mentally ill parolees

The Defendants submitted the following:

1. Define substantial compliance as concerns the Permanent Injunction
2. Define substantial compliance as concerns the Remedial Sanctions Order
3. Conclude and obtain report on telephonic probable cause hearing study by Office of the Special Master
4. Finalize and implement plan on due process for parolees who lack competency due to mental illness
5. Finalize and implement not in custody policies and procedures

As most attention was paid to mentally ill parolees and remedial sanctions, the other issues will be pursued in the upcoming terms.

Scope and Approach for This Report

This report continues the approach of reviewing each component of the Permanent Injunction and issues arising out of its interpretation. There is particular emphasis on topics subject to this Court's additional orders: remedial sanctions, mentally ill parolees, information systems, and internal oversight. Because there have been substantial improvements this Round in Defendants' ability to demonstrate compliance

with several timeframe requirements, this report will concentrate more on timeliness aspects and less on qualitative aspects.

This report discusses observations and activities spanning March through August 2008, collectively referred to as "the Round." Where data is employed, there are a few conventions. Defendants' data system was substantially revised effective in May 2008. Aggregate data for actions after this date commonly employs very different logic, and produces different results, than data concerning actions preceding that date. For the most part, then, this report discusses compliance data covering only June through August 2008 as the most accurate reflection of current compliance.[1] Data from other systems commonly begins where it left off in the Special Master's fourth report, covering February through August 2008. On occasion, data will reflect different, shorter periods where data collection was initiated part way through the Round, the providers of the data needed lead time for compilation, or other limitations.

This report also uses some language conventions. Progress and compliance are often discussed separately, reflecting that movement during the Round is worth recognizing, even where overall results may not match. In assessing either, this report uses the terms "resolved," "good," "adequate,' and "poor." At this stage of the remedy, one would expect most requirements to be partially implemented and, thus, "adequate." "Good compliance" is a high bar, and it takes sustained Rounds of "good" compliance to reach "resolved" status. When discussing problems, descriptors progress in severity from "minor" to "substantial" to "significant," and then stronger terms are used for issues of greatest concern. References to the Special Master's activities frequently include the actions of one or more members of his team. The term "monitoring reports" refers

collectively to reports generated by Plaintiffs' monitoring and by Defendants' self-monitoring, unless otherwise specified.

Remedial Sanctions

While this report will continue to focus primarily on progress made by Defendants on the elements of the Stipulation and Order Regarding Remedial Sanctions[2] ("Remedial Sanctions Order") that was negotiated between the parties and entered by the Court on April 4, 2007 and was to be implemented by April 1, 2008. The focus will begin to shift to satisfying the remedial sanction obligations under the Permanent Injunction. The continued progress by the Defendants in meeting the requirements of the Remedial Sanctions Order is creating the foundation for the broader discussion of what steps need to be taken to achieve compliance with the Permanent Injunction.

Defendants have continued to make consistent and good progress on meeting the requirements of the Remedial Sanctions Order. Unlike past reporting periods, progress has been consistent and there are several examples of proactive problem solving by the Defendants when they met with implementation challenges. The transfer of responsibilities from the Paroles Division to the Division of Addiction and Recovery Services has gone well and both divisions are to be commended for the effort that has gone into making this as smooth a transition as possible. Both divisions have demonstrated concern for the larger organizational mission by working well together. Just as the partnership between the Division of Addiction and Recovery Services and the Paroles Division has proven effective, the Board of Parole Hearings ("the Board") has demonstrated more active involvement with remedial sanctions than in any prior Round. The Office of Court Compliance has played a valuable role in problem identification and

solution. The ability of the Defendants' respective divisions and system players to collaborate in implementing remedial sanctions is quite remarkable given the continued changes in CDCR leadership and staffing.

Policies and Procedures

The Long-Term Memorandum Regarding Remedial Sanctions, related to the Remedial Sanctions Order, specified that several policies be revised, that use of inter-county transfers be expanded, and that remedial sanction program availability and use of inter-county transfers be shared with Plaintiffs and the Office of the Special Master.[3] Progress slowed in completing the requirements of the Remedial Sanctions Order in the fourth Round, but in this Round, the Defendants have completed all the requirements captured in the Long-Term Memorandum Regarding Remedial Sanctions.

With the approval and distribution of the electronic in-home detention policy to the field on August 15, 2008,[4] the Defendants completed the only policy that was outstanding under the agreed upon Long-Term Memorandum Regarding Remedial Sanctions. As with the other policies, one goal of the revision of the electronic in-home detention policy was to expand the pool of parolees eligible for electronic in-home detention. The exclusionary criteria in the original electronic monitoring policy included "parolees classified as Second Strikers, High Risk Sex Offenders, or Enhanced Outpatient Program participants**…**"[5] The revised policy excludes only "parolees being supervised with GPS technology."

The In-Custody Drug Treatment Program ("ICDTP") policy, which has been distributed to the field, is being revised. This revision is a proactive measure, suggested

by the Defendants, and is designed to clarify the changes that have resulted from the transfer of many ICDTP functions between the divisions, to distinguish between the procedures for the community-based program and the jail-based program, and to address Plaintiffs' concerns regarding parolees with disabilities. Discussion of this process is in the ICDTP section below.

- § Defendants have completed all of the requirements of the Remedial Sanctions Order contained in the Long-Term Memorandum Regarding Remedial Sanctions. There is good compliance and progress on this item.

Interim Remedial Sanction Placements

The Remedial Sanctions Order indicates that "While Defendants are building their ICDTP capacity leading up to 1,800 beds by April 1, 2008, Defendants shall make existing and proposed [Residential Multi-Service Center, Female Residential Multi-Service Center, and Parolee Service Center] beds available for use as remedial sanctions."[6] Defendants agreed to make one half of those programs' beds available as remedial sanctions. The parties subsequently stipulated to continue the use of those programs as remedial sanctions until at least September, 19, 2008. Recognizing that the Remedial Sanctions Order only requires that these programs be available, program usage is the best indicator that the programs were made available during this period. The interim and long-term memoranda concerning the Remedial Sanctions Order, Paroles Division training, and Board instructions all encouraged the use of those programs' beds as remedial sanctions during the phase-in of ICDTP. While initial use was limited, over time, Paroles Division tracking, Division of Addiction and Recovery Services tracking, and CDCR main system data demonstrated that referrals and placements have increased. The referrals stem largely from parole agent actions but there is some data that indicates use by Parole Administrators and Deputy Commissioners.[7]

In the last Round, the Paroles Division had created a Residential Multi-Service Center tracking sheet, which includes program capacity, referrals, all placements, and remedial sanction placements.[8] This data tracking has continued and provides a clearer picture than in past Rounds of the actual usage of Residential Multi-Service Centers for remedial sanction placements. Determining the accuracy of the Residential Multi-Service Center tracking sheet, however, is difficult. It appears that changes in the data collection system have resulted in different total program and remedial sanction placement numbers for the same reporting period. This, in turn, has created problems interpreting the data and, therefore, the data is used largely to discern trends in usage.

An example of the change in placement numbers can be found in comparing the Defendants' current Residential Multi-Service Center tracking sheet with the information provided to the Special Master in the last Round. The tracking sheet used in the last Round showed 13.8% of the placements for the month of October were remedial sanctions. The Defendants' recent compliance report shows 5.99% as remedial sanctions placements for the same month. Similar discrepancies occur in November and December of 2007.[9] This discrepancy calls into question the accuracy of the internal Paroles Division tracking system, but the trend clearly shows an increase in the use of the interim remedial sanctions.

The total program placement numbers provided in the Residential Multi-Service Center tracking sheet for this Round match the numbers in the Defendants' compliance report.[10] The data for this Round shows that Residential Multi-Service Centers are being consistently used as an interim remedial sanction .Table 1 shows the total number of placements made in Residential Multi-Service Centers and the number of remedial sanction placements. The trend continues to show growth in placements overall. There is a notable increase in the percentage of remedial sanction placements beginning in March 2008. In July and August, the overall placement numbers dropped because of a decrease in total available beds due to expiring program contracts in several jurisdictions. The

Paroles Division is in the process of replacing these beds.

The Residential Multi-Service Center programs are typically at 100% occupancy. Without an increase in funding for this program, it is unlikely that the numbers of remedial sanctions placements will increase significantly. Due to the high occupancy rates, there consistently are waiting lists for placement into the Residential Multi-Service Center programs. Remedial sanction placements reportedly have been given priority on the waiting lists for these programs.

Table 1

Number of Remedial Sanction Placements in Residential Multi-Service Centers 2008[11]

Month	**Total # Served**	**Remedial Sanction**	**Remedial Sanction as % of Total**
February	914	85	9.30
March	904	160	17.70
April	942	154	16.35
May	911	172	18.88
June	921	158	17.16
July	843[12]	208	24.6
August	814	306	37.5
Total	6246	1243	19.9

The first Female Residential Multi-Service Center opened in this Round, in April 2008 in Region I, and serves 26 women. One half of the initial placements were remedial

sanction placements. As of September, 14, 2008, there have been 57 total participants and of these, 38 people, or 67%, have been remedial sanction placements.[13] Because this is the only Female Residential Multi-Service Center, many female parolees came from counties throughout the state. Defendants are currently evaluating responses to proposals to add Female Residential Multi-Service Center programs.

Placements in Parolee Service Centers also continued to show an increase over the last Round. ***Referrals*** were at a high of 187 in April 2008 and have dropped to a low of 68 in August 2008.[14] In addition, remedial sanction ***placements*** in Parolee Service Centers have gone from a high of 137 in February 2008 to a low of 76 in August 2008.[15] The reason for the decline in referrals and placements of remedial sanction is unclear, but they still exceed those of the previous Round. The programs are continuing to run at almost 100% occupancy.

Table 2[16] compares the RSTS referral numbers and the internal Paroles Division placement numbers for remedial sanctions each month in the Round.

Table 2
Remedial Sanctions - Parolee Service Center Referrals and Placements

Month	RSTS Data	Internal Paroles Division Data
February	123	137
March	110	117
April	187	112
May	78	81
June	92	92
July	82	78
August	68	76

Total	740	693

In comparing the data systems' treatment of the different programs, data from CDCR's main information system regarding Residential Multi-Service Centers often shows fewer placements than the internal Paroles Division data shows. The Parolee Service Center data in CDCR's data system and the Paroles Division data more closely align, and the Female Residential Multi-Service Center data, which is generated out of the Female Offender Division of CDCR, is almost identical to the main system's data.[17] Despite the data discrepancies, there is clear evidence that all three programs are receiving remedial sanction placements and the number of placements has increased during this Round for Residential Multi-Service Centers. Monitoring will continue to ensure continued availability of interim remedial sanctions.

- § Defendants have completed all of the requirements of the Remedial Sanctions Order regarding the use of interim remedial sanctions. There is good compliance and progress on this item.

Expanding Jail and Community-Based ICDTP Programs

The Remedial Sanctions Order requires the Defendants to make every reasonable effort to establish 1,800 ICDTP beds by April 1, 2008. In addition, it requires that there be no fewer than 400 ICDTP beds per region, and no fewer than 40 ICDTP beds designated for female parolees in each region. The Remedial Sanctions Order also indicates that Defendants shall make every effort to secure 20 beds in each region that target the needs of parolees with dual diagnoses of mental illness and substance abuse.

According to the data tracking system in use on April 1, 2008, Defendants had acquired a total of 1,878 ICDTP beds statewide.[18] The combined total of jail and community-based ICDTP beds exceeded 400 in each region. Region I had 306 jail- and community-based ICDTP beds. In addition, Region I had 200 Parolee Substance Abuse Program beds that were made available as a remedial sanction, making a total of 506 remedial sanction drug treatment beds for Region I.

Table I indicates the number of available jail- and community-based ICDTP beds per region, as of this writing, as well as the number of available beds for women.

Table 3[19]

ICDTP Available Beds by Region

Type of Bed	**Region I**	**Region II**	**Region III**	**Region IV**
Total Jail Based	478[20]	130	0	152
Total Community Based	28	280	620	390
Female[21]	50	45	60	72
Total Beds	506	410	620	542

The Remedial Sanctions Order did not take into account that while the jail-based programs contract for dedicated beds, the community-based programs are fee for service. Because of this, it is not clear how many ICDTP beds were actually established on April 1, 2008. While CDCR knows on any given day exactly how many jail-based beds it has, the number of beds available in the community-based program fluctuates. The community-based providers contract with several organizations and with multiple client groups within organizations. For example, some programs contract for private pay fee for

service, county, state and federal clients. Few of these contracts are for dedicated beds so bed availability is on a first come, first served basis. The result is that the pool of beds available for placement fluctuates daily.

In March 2008, Plaintiffs' monitoring of ICDTP community-based programs raised a possible problem with the purported number of community-based beds. Plaintiffs inquired of the community-based program providers if the number of beds they had identified as available in their program was a realistic representation of capacity. In several instances, it seemed unlikely that the identified number of beds was realistic.[22] On April 1, 2008, it was clear that community providers had indicated a willingness to provide 1,318 beds, but unclear if the number of identified beds was accurate.[23] For example, while a Volunteers of America program in San Diego had an identified 20 beds for ICDTP parolees, the program had received no ICDTP parolees at the time of the site visit because the program was typically full and had a waiting list, so when ICDTP referrals had been made, there was no bed availability. The program had a total of 40 beds, which were typically filled with clients from other contract sources, making it highly unlikely that they would ever have 20 available beds for ICDTP referrals.

What was clear on April 1, 2008 was that 1,268 ICDTP parolees were in community-based programs and there was no data at the time that indicated referrals had been rejected due to lack of space in a program.[24] Considering that the contracts with many of the programs had been initiated between December 2007 and April 2008, the number of placements was a clear indication that the Defendants were making progress in expanding the number of ICDTP jail- and community-based placement options. Defendants thought they had identified a total of 1,878 jail- and community-based beds

on April 1, 2008, as well as an additional 200 Parolee Substance Abuse Program beds in Region I, for a total of 2,078 identified jail- and community-based beds.[25] Defendants attempted to identify more than 1,800 beds to ensure bed availability when needed. Thus, while it was not completely clear if the Defendants had met the requirement for 1,800 beds outlined in the Remedial Sanctions Order, it was clear that the Defendants had worked in good faith to meet the requirements.

The good faith effort by the Defendants was further evidenced in their swift response to the concern raised by Plaintiffs. Throughout April and May, Defendants worked to determine if, in fact, the number of beds was 1,878. An analysis in April 2008 showed that, in fact, a more realistic estimate of beds statewide was 1,810.[26] It appears that Defendants met the overall goal of 1,800 ICDTP beds but did not have the required 400 beds in Region IV.

At the May 15, 2008 meet and confer session, Defendants shared several efforts they had made to resolve the lack of clarity regarding the number of ICDTP beds. First, they worked with the regional Substance Abuse Services Coordination Agencies to ensure that the numbers of potential beds a program provided was realistic and revised the program lists accordingly. Second, they developed a system to categorize community-based beds as identified and available. The term "identified beds" is the number of beds the Substance Abuse Services Coordination Agencies and provider have agreed is a realistic representation of potential availability for any given program. The Division of Addiction and Recovery Services maintains a list of identified beds statewide. The "available beds" is a list created daily that indicates, by community-based program, where there is space available.[27] An available bed is one in which a parolee could be

placed within 5 days. This list is sent daily via e-mail to a wide range of administrators and line staff at the Board and in the Paroles Division, in headquarters and in the field. In addition, there are two placement coordinators in each region who work daily to ensure that Paroles Division and Board staff know which community-based ICDTP beds are available for immediate occupancy.

Concerns were also raised by Plaintiffs that many system decision makers, such as Deputy Commissioners and Parole Administrators, did not have accurate or timely information regarding the nature of the programs and bed availability.[28] In addition, while the problem of untimely transfers of parolees from jails and institutions, once approved for ICDTP placement, had improved since the prior Round, there still continued to be examples of transfer failures consistently cited in Plaintiffs' and Defendants' monitoring reports, Plaintiffs' requests for investigation for individual parolees, and information provided by CalPAP. Since February 2008, Defendants have not provided a comprehensive overview of the transfer delay problem. Defendants have acknowledged the problem exists but the scope and consistency of the problem is unknown.

Defendants are working to address the issue of timely transfer of parolees to ICDTP programs. The Division of Addiction and Recovery Services is engaged in an audit of the transportation process in each region. The audit is designed to identify any impediments in the referral and placement process with a major focus on the transportation challenges. It should be noted that the transportation issues appear to be isolated to the community-based programs. The data from each regional audit should help to clarify how many parolees are being impacted by transfer delays and the average length of time of the delays.

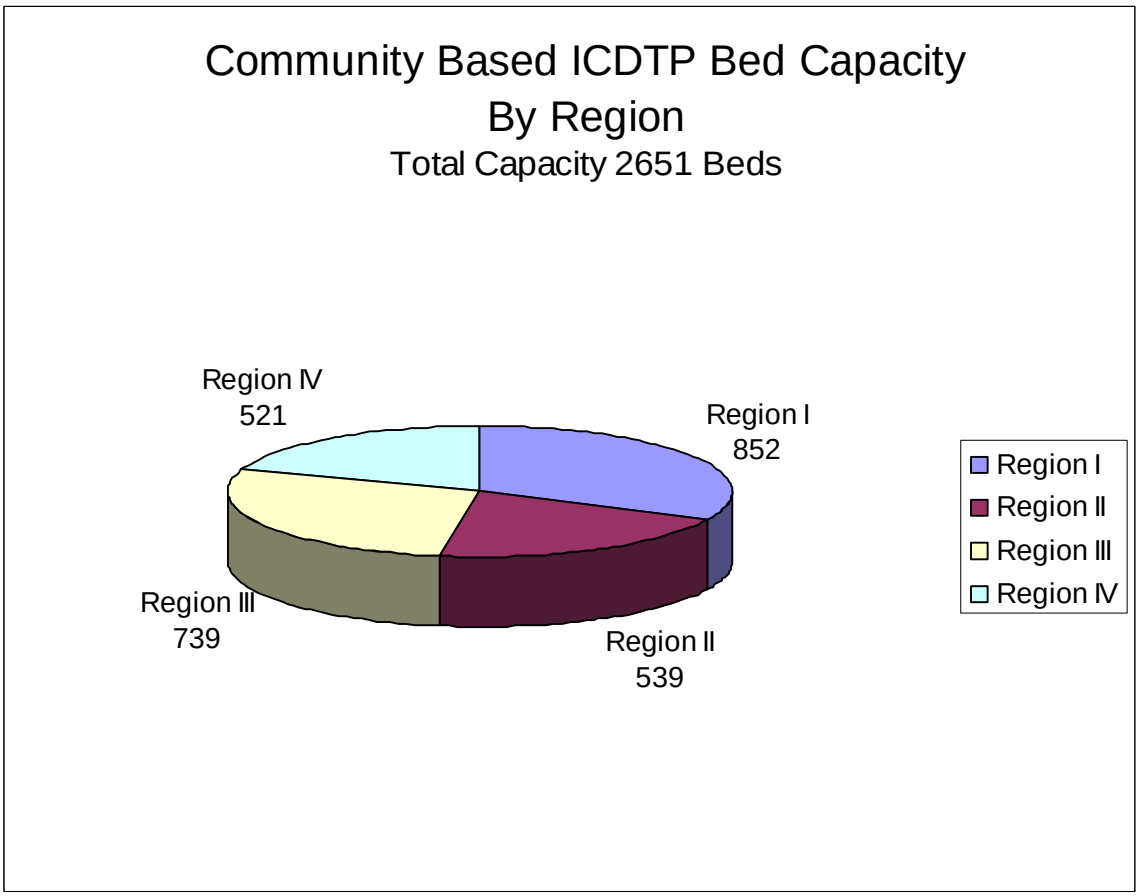
The audit is an example of a pattern of proactive problem solving in this Round on the part of the Defendants. Another example is the revision of the ICDTP policies and procedures. The transfer of ICDTP from the Paroles Division to the Division of Addiction and Recovery Services resulted in staffing and reporting changes. Defendants took this opportunity to not just clarify these issues but to address issues such as how to get better information to community providers about potential and incoming parolees. For example, Defendants worked with CalPAP to create a form that is completed by the parolee's counsel to provide needed screening information to community-based providers. Defendants' draft policies and procedures were submitted to Plaintiffs' counsel and the Special Master on June 18, 2008. Responses and comments were received from Plaintiffs' counsel on July 10, 2008, and Defendants provided their responses on August 26, 2008.[29] Defendants are revising the policies and have proposed potentially viable solutions for the few remaining issues.

The Division of Addiction and Recovery Services has not only been responsive when problems arose but, rather than waiting for the Plaintiffs, the Special Master, or the Office of Court Compliance to suggest or structure solutions, the division has proposed solutions. The proactive and swift response of the Division of Addiction and Recovery Services to problems has resulted in faster resolution than in prior Rounds.

The Division of Addiction and Recovery Services has continued to increase the number of community-based ICDTP beds. By August 2008, there were 2,651 identified community-based ICDTP beds[30] found in 183 community-based programs throughout the state. A variety of factors will result in the actual number of beds and programs changing over time. For example, the economic downturn resulted in some programs losing private

payer contracts and a subsequent increase in a willingness to contract for more ICDTP beds. Conversely, a failure to adhere to program and contract standards can result in a loss of programs and beds. As noted in the internal oversight section of this report, the Division of Addiction and Recovery Services and other state and local agencies monitor the community-based ICDTP providers. If contract violations are found, placements can be suspended.

Table 4[31]
Division of Addiction and Recovery Services
Provider Counts Tracking



On August 22, 2008, there were 1,359 parolees in community-based ICDTP programs and 447 parolees in jail-based ICDTP programs, for a total of 1,806 parolees

using the ICDTP remedial sanction. It is the opinion of the Special Master that the Defendants made "every effort to make 1,800 ICDTP beds available for use as remedial sanctions no later than April 1, 2008," thereby meeting the requirement of the Remedial Sanctions Order. The effort is further evidenced by the placement of more than 1,800 parolees in ICDTP programs by August 1, 2008. Monitoring will continue to see if the Defendants' efforts to eliminate Plaintiffs' concerns regarding the lack of knowledge by key system actors about the programs and bed availability are successful.

- § Defendants have completed all of the requirements of the Remedial Sanctions Order regarding the availability of 1,800 ICDTP beds. There is good compliance and progress on this item.

Creating ICDTP Options for the Dually Diagnosed Parolees

Of the 1,800 ICDTP beds in the Remedial Sanctions Order, 20 beds in each region were to be identified to target the needs of parolees with dual diagnoses of mental illness and substance abuse. Defendants created specifications for ICDTP providers delineating the requirements for serving dually diagnosed parolees. The criteria was reviewed with Plaintiffs at a December 7, 2007 meet and confer session. In the May 15, 2008 meet and confer session, Defendants indicated that each region had between 22 and 28 community-based programs that could accept dually diagnosed parolees. Plaintiffs raised questions at the meet and confer session regarding the services offered, and they shared experiences from monitoring trips that raised doubts that some of the programs that were identified to serve the dually diagnosed parolees actually had the necessary skills, abilities and services to do so.

Based on this feedback, the Division of Addiction and Recovery Services surveyed all the community-based providers in late May 2008. Survey results were

received and collated in June 2008. The Defendants created a compliance worksheet that the community-based provider completed, which documents their ability to meet the agreed upon standards for programs for the dually diagnosed. As of the end of August 2008, the Defendants had eliminated many community-based providers from the original list of those who indicated they could serve the dually diagnosed.[32] There are still well over 20 identified beds for the dually diagnosed in each region on the refined provider list.[33]

Comparing the initial lists of providers who can provide services for the dually diagnosed parolees in community-based ICDTPs with the lists created after the compliance survey, it appears that there were more than 20 beds available in each region on April 1, 2008. It is clear that by August 2008, there were *credible* providers of well over 20 beds for dually diagnosed parolees in ICDTP programs in each region. Plaintiffs' monitoring data helped Defendants create a more accurate and credible list of providers.

The actual amount of use of the identified beds for dually diagnosed parolees remains unclear. No data has been provided regarding how the referral sources (parole agents, Unit Supervisors, Parole Administrators, Deputy Commissioners, and parolees' counsel) are aware of the programs, and therefore making referrals, and/or if the Division of Addiction and Recovery Services has a system in place to match referrals with providers. This issue will be explored in the next Round.

- § Defendants have completed the requirements of the Remedial Sanctions Order regarding the availability of 20 ICDTP beds for dually diagnosed parolees per region. There is good compliance and progress on this item.

Accommodating Parolees with Disabilities

Defendants agreed, in December 2007, to modify the ICDTP policies in part to better define the procedure for how jail- and community-based ICDTP programs will accommodate parolees with disabilities. Drafts of policies were sent to Plaintiffs and feedback regarding revisions was provided to Defendants from Plaintiffs.[34] The parties have reached agreement on the sections of the policies that speak to issues regarding parolees with disabilities. Examples of changes that have been made include ensuring that the Division of Addiction and Recovery Services has real-time access to the disability database system, having a contract with the Substance Abuse Services Coordination Agencies for interpretation services, and maintaining a list of certified interpreters.

One significant problem has been the lack of adequate information reaching the community-based program providers regarding any special needs for incoming ICDTP parolees. Defendants have created the ICDTP Self-Disclosure Questionnaire, which is completed by the CalPAP attorney and the parolee. The attorney faxes the completed questionnaire and consent forms to the Division of Addiction and Recovery Services. It is hoped that this will improve placement decisions and provide information about special needs to the community-based provider prior to the arrival of the parolee. This process was recently implemented and is being monitored to see if it results in better services for parolees with disabilities.

- § Defendants have completed the requirements of the Remedial Sanctions Order regarding accommodating parolees with disabilities. There is good progress and good compliance on this item.

Out of County Transfers

An area of the Long-Term Memorandum Regarding Remedial Sanctions where compliance with the Remedial Sanctions Order had not been achieved, prior to this Round, was that of the use of out-of-county transfers. The memorandum clarifies that temporary placement of out-of-county parolees in remedial sanctions is not restricted by the 5% limitation on out-of-county transfers applicable to other parole programs.

In prior Rounds, Defendants had only produced anecdotal information that there was some use of the out-of-county transfer mechanism. During this Round, at a meet and confer session on May 15, 2008, Defendants shared copies of lists of parolees in ICDTP who were examples of out-of-county transfers. The Defendants' compliance report shows another example of such data[35] and, upon request, Defendants sent yet another sample on September 5, 2008[36] to the Office of the Special Master. With the exception of two counties in Region IV, all counties now accept out-of-county transfers. Defendants worked with the two counties in Region IV that refused to accept any parolees from outside of their county and they now accept parolees from neighboring counties, but will not accept parolees from outside their region.

The data is clear that out-of-county transfers are used regularly in every region of the state. There does not appear to be any reason to institutionalize a formal reporting system on this issue because ad hoc reports can be fairly easily generated.

- Defendants have completed the requirements of the Remedial Sanctions Order regarding the out of county transfer requirement. There is good compliance and progress on this item.

Electronic In-Home Detention

The Paroles Division has taken several additional steps to remind parole agents that electronic monitoring is a remedial sanction. Such efforts include an electronic alert in May 2008.[37] Beginning April 8, 2008, a four-hour block of training about electronic monitoring was added to the curriculum at the training academy for new parole agents. The Paroles Division headquarters electronic monitoring unit sends a weekly update to Parole Administrators and the Board regarding regional availability and usage of the electronic monitoring equipment.[38] In February 2008, the planned main information system modification, which allows for tracking of referrals and use by region, went into effect. This data indicates electronic monitoring continues to be a sanction that is used most commonly at the unit level with a small handful of cases being referred to the Board with a recommendation for electronic monitoring.[39] A good faith effort has been made to both remind key personnel to consider the option of electronic monitoring as a remedial sanction and training for new parole agents has been institutionalized.

Data is provided each month by the Paroles Division regional electronic monitoring coordinators. As in the last Round, this data indicates that Defendants have exceeded the number of units, 250, that must be "dedicated to use as remedial sanctions."[40] Plaintiffs have contended that, in fact, these numbers do not represent compliance with the Remedial Sanctions Order because it is not clear that the numbers that reflect use for remedial sanctions can be proven to be different from those used for enhanced supervision. At the request of the Special Master, the Defendants took a 10% sample of electronic monitoring cases for the months of April and May 2008.[41] The Special Master's team reviewed the sample and agrees that it is not possible to

distinguish the use of electronic monitoring for remedial sanctions from enhanced supervision purposes based on case factors.[42]

Just as the decision whether to revoke a parolee is at the discretion of the agent, so is the determination of whether the use of electronic monitoring is a remedial sanction or enhanced supervision. Decision making in the California parole system is not highly structured, nor does the system use objective predictive tools to assist in classifying which type of sanction should be used for a particular purpose. While the lack of such tools and processes clearly limits CDCR's ability to match parolees with the most effective intervention or sanction, without such tools, the decision whether electronic monitoring is a remedial sanction or enhanced supervision lies with of the agent of record and his or her supervisor. Therefore, it is the opinion of the Special Master that the decision as to the use of electronic monitoring is discretionary and the Defendants are only required to document the intentions of the agent or record and unit supervisor. There is no burden to prove why a particular decision was made. As Table 5 indicates, Defendants continue to demonstrate both use of electronic monitoring as a remedial sanction and availability of phone lines.

Table 5[43]

Use of EID as a Remedial Sanction or Enhanced Supervision

Month	# of available units	Active Units	REMEDIAL	ENHANCED	PHONE LINES
Jun 07			177		
Jul 07			271		
Aug 07			288		
Sep 07			278		
Oct 07			266		
Nov 07			277		
Dec 07			335		
Jan-08	500	406	341	65	0

Feb-08	500	446	350	96	0
Mar-08	500	464	348	116	2
Apr-08	500	465	347	118	2
May-08	500	487	376	111	2
Jun-08	500	485	377	109	0
Jul-08	500	478	366	113	0
Aug-08	500	478	361	117	0

- To the extent that it can be determined, Defendants have completed the requirements of the Remedial Sanctions Order regarding the dedication of 250 electronic monitoring units for use as remedial sanctions. There is good compliance and progress on this item.

Decision Matrix

Although not a requirement of the Permanent Injunction, adoption of a validated decision matrix would ensure that decision makers in the *Valdivia* process have given consideration to the use of remedial sanctions when appropriate. As previously noted, the lack of a valid risk assessment tool and any type of violation matrix has resulted in a situation where the decision to revoke parole is largely made at the line level. The *Valdivia* process creates multiple opportunities to review a decision to potentially revoke parole but it does little to assist the line parole agents (agents of record) to think more broadly about the purpose of parole and the impact of the revocation decision upon the goal of successful parolee re-entry into society. The *Valdivia* remedy, while ensuring due process for parolees, does not increase the understanding of the efficacy of revocation or expand the knowledge and thinking of correctional personnel regarding the most effective ways to avoid unnecessary revocation.

If a goal of the Permanent Injunction is to reduce the number of unconstitutional and unnecessary parole revocations, the *Valdivia* process in and of itself will not achieve

this outcome. Resolving parole failures quickly and in the best way to avoid revocation typically requires implementing a different way of thinking about revocation. One step in this process is to structure decision making. The implementation of structured decision making in the revocation process is a strategy that has been successful in reducing parole revocations throughout the country.

The Paroles Division has scheduled a master trainer training for October 14 through 16, 2008. Those trained in this session will then help to implement four regional pilots throughout the state. No date has been set for the training of the pilot sites.[44]

The implementation of the pilot program has been delayed repeatedly since its original projected date in the fall of 2007. It is unclear what has delayed the implementation in the last six months.

§ There is good performance on this item and poor progress in this Round.

Consideration of Remedial Sanctions at Each Step

A key concern of Plaintiffs' has been whether remedial sanctions are being considered at each step in the *Valdivia* process. In prior Rounds, Defendants' data collection systems could not answer this question. Better information may be available in the next Round because Defendants modified the main data system to report whether remedial sanctions were considered at the probable cause determination by the unit supervisor and parole agent, the Parole Administrator review, the return to custody assessment, the probable cause hearing, and the revocation hearing.

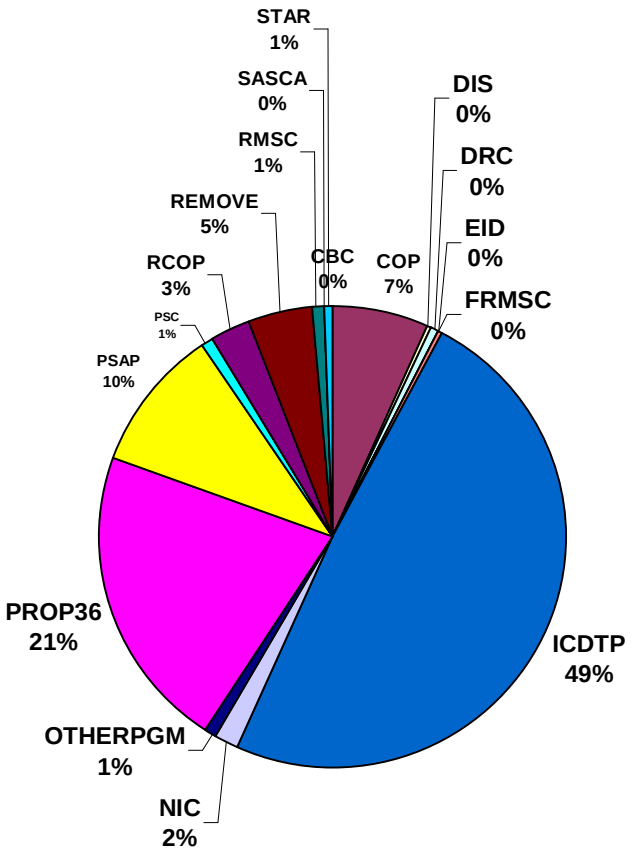
In the past, anecdotal and monitoring data from the parties have appeared to indicate that remedial sanctions were not considered with great frequency or consistency

at steps in the *Valdivia* process after the parole unit supervisor review. Two data reports, Parole Administrator Statistics and Closed Case Remedial Sanctions Summary, indicate that referrals to remedial sanctions are being made at all steps of the *Valdivia* process.

An analysis of Parole Administrator decisions from February 1, 2008 through August 31, 2008[45] demonstrate that in 8,871 instances, Parole Administrators recommended remedial sanctions or other CDCR or community-based alternatives to revocation. The breakdown of the Parole Administrator decisions is in Table 6.

Table 6

Use of Remedial Sanctions by Parole Administrators
February 1, 2008 through August 31, 2008



This data appears to indicate that Defendants' effort to educate Parole Administrators about the use of remedial sanctions has resulted in greater initiation of the use of remedial sanctions at this step in the *Valdivia* process. Parole Administrators are advocating in many instances for the use of remedial sanctions.

The Closed Case Remedial Sanctions Summary report shows each step in the *Valdivia* process and whether a remedial sanction is recommended and/or provided.[46] The data does not distinguish between a recommendation and a decision.[47] This report clearly demonstrates that there is some substantial consideration for the use of remedial sanctions at every step in the revocation process.

Using California Institution for Women as an example, between June 1, 2008 and August 31, 2008, out of 1,357 total cases, it appears that 596 women went to remedial sanctions at the unit level. The Parole Administrators made additional recommendations. At the return to custody assessment, Deputy Commissioners suggested remedial sanctions for more than 25% of the remaining cases, and for nearly 100 more women at probable cause hearing. Revocation hearings also concluded with remedial sanctions, albeit at a lower rate of 10%.

- There is adequate progress on this item and compliance is adequate.

Meeting the Remedial Sanctions Order Benchmarks

Recognizing that meeting the conditions in the Remedial Sanctions Order does not mean the conditions of the Permanent Injunction have been met, the status of complying with the Remedial Sanctions Order does serve as an excellent progress report with regard to the implementation of remedial sanctions. It is the opinion of the Special

Master that the Defendants have met the following benchmarks set in the Remedial Sanctions Order:

- Establish policies and procedures necessary to implement both interim and long-term remedial sanctions;
- Provide training regarding the remedial sanction programs and the implementation of policies and procedures;
- Establish 1,800 ICDTP beds for use as remedial sanctions;
- Establish a minimum of 400 ICDTP beds per region;
- Establish a minimum of 40 ICDTP beds per region for female parolees;
- Establish a minimum of 20 ICDTP beds per region for dually diagnosed parolees;
- Have 500 electronic monitoring units available statewide and dedicate the use of 250 of these to remedial sanction placements;
- At the discretion of CDCR, provide telephone service for use in electronic monitoring;
- Make available one-half of Residential Multi-Service Center, Female Residential Multi-Service Center, and Parolee Service Center beds for remedial sanctions until 1,800 ICDTP beds are available;
- Report every 60 days regarding the development and implementation of a parole decision-making matrix;
- Modify policy to allow for the temporary placement of out-of-county parolees into remedial sanction programs;
- Develop a system by which every Paroles Division and Board decision maker is able to determine the availability of ICDTP remedial sanctions statewide on any given day;
- Provide parolee defense counsel all program policies and procedures, to include exclusionary and inclusionary placement criteria; and
- While delayed by mutual agreement, parties met and conferred regarding the continued use of the interim remedial sanctions.

There are a few remaining unresolved issues in the Remedial Sanctions Order. They include:

- There has not yet been the development of a system by which every Paroles Division and Board decision maker is able to determine the availability of electronic monitoring remedial sanctions statewide on any given day.

- While there are ICDTP beds in each region for female parolees and also a Female Multi-Residential Center, there has not yet been discussion regarding the issue of whether women are offered an equivalent service or equal access to remedial sanctions. The issue of equivalency for disabled parolees has not yet been fully explored. Defendants are revising their policies and procedures to ensure equal access.

- Defendants have done several rounds of training for decision makers in the *Valdivia* process. Data analysis in this Round shows evidence of remedial sanctions being considered at each stage in the revocation process, but it is unclear if actions to date are adequate. There is no defined plan for how to track the consideration of remedial sanctions at each stage in the proceeding.

- While there is clear evidence of the use of other programs that are not specifically called remedial sanctions to avert revocation, it is not clear what is the standard to achieve the benchmarks regarding "alternative placement in structured and supervised environments" and self-help outpatient/aftercare programs.

    - § There has been good compliance in meeting the benchmarks of the Remedial Sanctions Order.

Future Issues

It will be important in the future to continue monitoring the use of remedial sanctions. The most pressing problem is the issue of delays in transferring parolees from jails to community-based programs in a timely fashion. The regional audits that the Division of Addiction and Recovery Services is undertaking should help to determine the causes and potential solutions for this problem. Defendants are continuing to negotiate for additional bed space where desired and, as needed, are modifying or eliminating programs.

The parties have met and conferred regarding the continued use of Residential Multi-Service Centers and Parolee Service Centers as remedial sanctions. The parties have crafted a proposal that is being vetted by CDCR decision makers. The parties are also working to reach agreement on modifications to ICDTP policies and procedures.

Having met most of the benchmarks of the Remedial Sanctions Order, it is time to focus on the array of programs that are not identified in the Permanent Injunction but are referenced as structured and supervised environments or self-help outpatient/aftercare programs. Understanding what role, if any, these programs have in the revocation process is a necessary next step. Typically, parole decision matrices include a wide array of services. If that is the case in CDCR, this issue may be resolved through that mechanism.

Once the benchmarks of the Remedial Sanctions Order are met, it will be time to consider how to meet the requirements of the Permanent Injunction. Future Rounds will focus on continued monitoring to ensure institutionalization of gains made and to address the broader issue of the Permanent Injunction requirements.

Mentally Ill Parolees

The parties have worked since 2005 on determining methods to provide due process to parolees who appear unable to participate in revocation proceedings by virtue of mental illness. All acknowledge that this must involve balancing providing access to treatment in the hope that the person will be able to participate in a defense while ensuring there is legal authority to hold the person. Many ideas were considered, and plan development sometimes progressed, sometimes stalled or reversed course in those years.

During the last Round, on January 14, 2008, this Court ordered CDCR to "…undertake and sustain work toward the earliest practical solution to providing due process to parolees who appear, either in the judgment of their attorneys or defendants' staff, too mentally ill to participate in revocation proceedings."[48] That order required consultation with the Special Master's team and Plaintiffs' counsel, and set forth a schedule for updates, plans, policies and procedures, and implementation.

Since that time, the parties have worked diligently toward producing a viable plan. Defendants complied with the Order's requirements as of the Fourth Report of the Special Master. Shortly before the filing of that report, they presented a very new approach to a plan, which was a significant departure from previous plans and required substantial time and resources to negotiate substantive issues, and formulate and negotiate attendant procedures and logistics.

That plan had significant drawbacks, and in August 2008, Defendants replaced it with the plan currently being negotiated, one with excellent features. It provides a flexible standard that uses clinical input to assist Deputy Commissioners in determining whether parolees are capable of participating meaningfully in proceedings; that standard can be applied during clinical contacts in a timely manner that allows hearings to go forward in a reasonable time.[49] The plan requires staff to refer parolees for evaluation if the parolee's mental state is of concern to the staff member. It allows attorneys access to their clients and fosters communication among the various concerned divisions. It provides a mechanism to bring parolees back to hearing at regular intervals, to facilitate hearings taking place soon after parolees are capable of assisting in their own defense.

The most important plan components that remain to be developed concern the method of calculating time in custody and on parole, and the mechanisms for carrying out the plan when parolees are transferred offsite to higher levels of care within CDCR or Department of Mental Health. Plaintiffs would also like to see the plan emphasize community treatment options, consider return to custody to be a last resort, provide reviewers knowledgeable about available community treatment options, and provide pre-release planning to make use of those options and to provide continuity of care.

In the interim, the parties negotiated temporary procedures that employ several of the measures described above. Previous methods of monitoring parolees whose hearings had been suspended worked erratically, so Defendants began automatically calendaring this population every two weeks. In July, CalPAP attorneys also assumed responsibility for meeting with these clients at least every two weeks to review their ability to participate in a defense. CDCR and CalPAP weekly information system tracking methods serve as a failsafe for each other. Defendants provided training for Deputy Commissioners on recognizing the signs and symptoms of mental illness, and CalPAP trained its attorneys on that subject as well as the skills involved in interviewing such clients.[50]

These procedures have affected 52 parolees in the most recent period.[51] There is evidence that Deputy Commissioners are mitigating penalties in recognition of mental illness, and that some parolees are accessing higher levels of care. The holds were dropped for four parolees who had not been able to participate in a hearing for several months. At hearing, another two were given credit for time served, two cases were dismissed, and one parolee was placed in ICDTP. Additionally, seven parolees have been

placed in the Department of Mental Health under provisions for those incompetent to stand trial.

Tracking documents attorney contacts with this population every one to two weeks since July, to facilitate a quick return to hearing once the parolee is capable. Nearly 40% of those with suspended hearings regained an ability to participate and have concluded those hearings. About half of them returned to hearing in one month or less after the suspension; the time to hearing for the rest took up to six and one-half months.

Among those currently in custody without a hearing, the time since suspension ranges from one week to four and one-half months, with the majority held for the longer periods in this spectrum; several of them are in Patton State Hospital. One parolee reached his release date ("RTCA") without having had a hearing.

A subset of any population with hearings suspended for mental health reasons requires treatment at a level of care higher than CDCR provides. Although CDCR contracts with Department of Mental Health ("DMH") for acute and intermediate care beds, DMH has not accepted parolees who have not been revoked, basing its position on an argument that DMH cannot take legal custody of them. This Court issued an order on August 8, 2008, directing that this population shall have full access to DMH according to *Coleman* Program Guide criteria.[52] In addition, the order directed parole agents to take parolees, who appear to be a danger to themselves or others because of mental illness, to be evaluated at community hospitals for short-term involuntary commitment under California Welfare & Institutions Code § 5150; the order also endorsed the suspension of revocation hearings if the parolees appear too mentally ill to participate.

In an August meet and confer session, CDCR described having headquarters Division of Correctional Healthcare Services staff review various data from the field to identify parolees in this population who may be appropriate for DMH placement, and encouraging such referrals. In a September 12, 2008 meet and confer session, CDCR and DMH indicated they had not yet discussed mechanisms for conducting hearings and carrying out other aspects of the plan for parolees with suspended hearings. DMH administrators said they had communicated about the order, but it was unclear who had been informed and how.

The Special Master has received reports for more than one year that CDCR and DMH were negotiating an addendum to their memorandum of understanding governing a number of changes, including those related to treating this population of parolees in custody for alleged parole violation. The Special Master was not provided a copy of any document draft throughout that time, despite multiple requests, and received little substantive description of its contents. The Special Master has not been included in negotiations, and it is his understanding that the Board of Parole Hearings has not participated in them directly, being represented solely by the administration of Division of Correctional Healthcare Services responsible for *Coleman*, who have limited exposure to the substance and requirements of *Valdivia*. In late September, CDCR did provide the draft memorandum of understanding pursuant to the Special Master's most recent request.

On September 19, 2008, Plaintiffs issued a Notice of Violation concerning the Court's August 8, 2008 Order, observing that CDCR clinicians at one institution were unfamiliar that the obstacle to DMH referral had been removed and raising the concern

that CDCR and DMH clinicians had not been educated about the order.[53] It appears that one parolee with a suspended hearing has been placed at the DMH facility at California Medical Facility.[54]

The Court's original deadline was June 15, 2008 for implementing a plan for mentally ill parolees unable to participate in revocation proceedings. The Special Master extended this time as the parties continued to make progress. It will be critical for CDCR and DMH to meet their commitments to negotiate procedures for hearings and monitoring parolees while at DMH, and to ensure that parolees are referred to, and treated at, DMH facilities when clinically appropriate. Similarly, Defendants must keep on track their current efforts to finalize a plan and memorialize it in policies and procedures. The goal is within reach and the picture looks promising.

§ There is good progress and adequate compliance with these court orders.

Information Systems

This Court ordered in November 2006 that Defendants initiate information system application changes to improve their ability to manage revocation proceedings and to demonstrate compliance. Defendants were required to complete the changes within one year and six months of that Order.[55]

During this Round, Defendants rolled out a major information system upgrade to comply with this Order, reflecting many months of sustained, coordinated efforts by information systems staff and contractors and representatives of many staff constituencies. Changes touched on many areas of revocation operations and were

successful, in large measure, in implementing much of what was contemplated by the Order.

One of the most major improvements was creating a centralized system to manage revocation extensions,[56] a process related to in-custody misconduct allegations. Where previous efforts were idiosyncratic to each institution, the central information system now supports uniform entry of information, case tracking to ensure they move through the system timely, reports to capture compliance on several requirements, and access to information for a much broader constituency needing it.

The system newly gathers information to track paperwork flow and reduce or more quickly remedy related obstacles. It gathers information needed to demonstrate compliance with more of the Permanent Injunction's requirements, such as the date information is provided to the attorney panel and the date that parolees subject to extradition arrive in California.

The system also structures input to elicit more rationale associated with certain decisions and actions, such as remedial sanctions consideration and unsuccessful attempts at service. It creates reports to access some of that qualitative information, which can support analyses of good cause for missing requirements and some aspects of whether substantive due process is being satisfied in hearings.

Several functions were redesigned to conform to actual practice, which should lead to more efficient case handling, reduced staff frustration, and more accurate data. For example, staff no longer must choose to indicate a proceeding occurred in circumstances when no proceeding is required, a problem that interfered with analyzing

true patterns, raised suspicions about the accuracy of data generally, and risked obscuring any problem cases.

Even more importantly, greatly expanded reporting capacity allows CDCR to make use of a great deal of data already in its possession. There is now more capacity to show the frequency and timeliness for cases requiring special handling. Several reports' logic has been rewritten to more accurately reflect general practice. Report formatting is more clear and descriptive of the contents. Several timeliness reports reflect the degree to which a requirement was missed, supporting the more holistic analysis needed to define substantial compliance and measure whether it has been met.

As with all information systems solutions, some operational problems need to be addressed after implementation. By all reports, CDCR and its contractors appropriately continued to work through unintended consequences, mistakes, and additional needs and desires for the system. Two sets of remedies and changes have been launched and staff representatives continue to meet regarding further problems and refinements.

Much progress has been made in generating the ability to demonstrate compliance with *Valdivia* requirements, and many of the needs initially defined by CDCR, Plaintiffs, and the Special Master are in place. Some features, however, are outstanding. It will be important to address them either through the continued information system change process, or Defendants will need to construct other means to demonstrate compliance. Still absent is an ability to show timeliness of notices of rights, Parole Administrator review, attorney appointment, hearings after activated optional waivers, and pending cases for several of the populations with special requirements. Anticipated reports

capturing referrals to specific remedial sanctions programs will be most welcome. Unexplained inconsistencies in aggregate numbers will need some attention.

On the whole, however, very important progress has been made. Much of the spirit of the November 2006 Order has been met and, while the changes are not "complete," in the language of the Order, as of its deadline, they are certainly implemented. These changes will serve as a key piece of the foundation for reaching and demonstrating substantial compliance.

§ There is good progress and good compliance on this requirement,

Internal Oversight

In prior Rounds, Defendants created the Office of Court Compliance consistent with the *Valdivia* Court's November 13, 2006 order. Staffing was hard hit during this Round. When Defendants undertook a reconciliation to clarify what positions are funded, this office lost three positions, and nearly half of the remaining positions are vacant or on assignment to another department. Only one of the five leadership and Deputy Commissioner positions is filled.[57]

As described in prior reports of the Special Master, the unit designed and implemented very good auditing methods for use on site visits and for some headquarters-based inquiries. Staff worked with CalPAP to design collaborative and complementary methods of capturing information. The office carried forward previous work to identify and address deficiencies in timeliness, forms completion and availability, and consistent policy implementation. The group appropriately began to review questions of substantive due process, surfacing good practices and working with all divisions to address those that needed to be strengthened.[58] Many of the improvements

cited below were the result of this work. The Mastership has not examined the unit's capacity to sustain this level of work under current staffing conditions.

The core of the office's work involves large-scale pre-audits and routine site visits on a schedule negotiated with Plaintiffs. The visits result in reports and recommendations for corrective action.

Responsibility for follow-up is distributed among multiple parties. The Office of Court Compliance reports that staff email the relevant Associate Chief Deputy Commissioner or Supervising Notice Agent within days after the site visit, noting issues requiring attention, and staff say they follow up two days before the draft report is complete. Staff report that they frequently receive responsive emails describing the action taken to remedy the issues. Staff indicate they provide an executive summary of their reports to all division leaders.[59]

An Associate Chief Deputy Commissioner is responsible for overseeing remedies for the Board when deficiencies are identified in reports by the Office of Court Compliance, Plaintiffs, or the Special Master. He reports that he requires the Associate Chief Deputy Commissioner responsible for the facility in the report to produce a corrective action plan in two weeks, and that he follows up at that time. It did not appear that staff had initiated reviews to identify obstacles when thornier issues present, nor examinations of whether initial explanations or remedies solved the problems as anticipated.[60]

The Paroles Division response does not appear to take the form of corrective action planning. Rather, many levels of local, regional, and headquarters supervisors receive the full monitoring reports and distribution to line staff is encouraged. That

division is making additional efforts to ensure that staff eligible for promotional exams to a supervisory level are knowledgeable in areas related to current litigation and compliance. Where an issue appears limited to an individual, Office of Court Compliance staff reportedly describes the issue to the person's supervisor and headquarters staff, who are expected to follow up.[61]

Both divisions indicate they distribute information about patterns of deficiencies through routine mailings[62] and routine leadership meetings.[63] Other topics are handled by convening leadership meetings on point; conducting "block" training; or distributing specialized, topic-specific communications, with supervisors required to discuss them with staff within a time certain.[64] Paroles Division heads say staff recently synthesized the findings of all monitoring reports for the last year and distributed it to staff, and they plan to repeat this annually. The division anticipates initiating an internal *Armstrong* auditing unit, and planned information system changes should facilitate those reviews. Leaders foresee potentially seeking expansion of that unit, once it is well-established, to support *Valdivia* compliance efforts.

In addition to monitoring visits and participating in corrective action follow-up, the Office of Court Compliance undertakes topic-specific projects. Staff worked with the Paroles Division to enhance training for the academy and refresher sessions concerning notices of charges that satisfy due process, and documentation that fairly represents a parolee's history by separating arrests from convictions.[65] Staff say they used new data system capacities for tracking revocation packets to identify and reduce obstacles to timely hearings, following up with specific units or offices when problem trends were apparent. Staff carried forward an inter-divisional review of extradition cases and the

obstacles to timely notice and hearings for them. In prior Rounds, staff had designed and implemented remedies, tested and adjusted them; during this Round, staff continued audits to determine whether the remedies were sufficient.[66] In early 2008, the office initiated reviews to begin to identify the complex issues underlying the many compliance failures evident at Los Angeles County Jail. It appears that that effort did not continue, a problematic development given the great need for attention to remedying that facility's deficiencies.[67]

Additionally, The Division of Addiction and Recovery Services contributes to oversight through several new mechanisms for ICDTP programs and refining some existing systems. The Division is to be commended for the improvements that they have made in the tracking and monitoring of the ICDTP programs and services that are discussed in the Remedial Sanction section of this report.

The Division of Addiction and Recovery Services continues to work with Substance Abuse Services Coordination Agencies and community-based providers to ensure compliance with the American with Disabilities Act (ADA).[68] To ensure ADA compliance, the division collaborated with the Paroles Division to make wheelchairs available for loan to community-based providers and has built into contracts the resources for the purchase of wheelchairs. Starting in fiscal year 2009-2010, the Division of Addiction and Recovery Services has enhanced its contracts to require higher gender- and trauma-specific standards and will use a federal ADA monitoring assessment tool..

The Division of Addiction and Recovery Services investigates allegations of mistreatment of program participants or misuse of resources. One investigation resulted in the transfer of several parolees to new programs. Other investigations have resulted in

community-based providers either making changes in program services or being removed from the list of identified providers.[69] Quarterly meetings with the Substance Abuse Services Coordination Agencies are used to discuss quality improvement and regulatory issues.

Finally, the Division of Addiction and Recovery Services has assigned personnel to attend all *Valdivia* monitoring tours to ensure compliance with contractual agreements as well as requirements of the Permanent Injunction. Program managers also conduct unannounced monitoring site-visits separate and apart from the *Valdivia* monitoring to ensure the integrity of program services.

A Quality Control Unit has operated long-term and is currently undergoing a restructuring of its functions and staffing to match the current demands for information and analysis.[70] During that transition, staff are reviewing a sample of hearing records ("1103s") for whether the reasoning is clear and reflects support for the elements of the violation, and whether decisions such as statutorily defined time-earning status are made accurately. They work through an Associate Chief Deputy Commissioner to address such identified problems. The unit is working toward reviewing a 10% sample of all hearings for mistakes of law or fact, and producing data reflecting their work.

A Task Force composed of representatives of all affected divisions and the attorney panel continues to meet biweekly to troubleshoot and share information. Headquarters staff conducts weekly reviews of some cases shown as late to determine the reasons.[71] For management, the data system generates several reports that allow a review of open cases as they approach deadlines and to research and remove obstacles to prevent late cases or remedy them. Staff report that field and headquarters managers routinely

review and act on these reports, in addition to the distributed information described above.[72]

§ There is good progress on this requirement and adequate compliance.

Permanent Injunction Requirements

Meet periodically regarding policies, forms, and plans; submit policies and procedures to the court no later than July 1, 2004 with full implementation by July 1, 2005
Complete implementation of policies and procedures by July 1, 2005

On July 1, 2004, the Defendants did submit a variety of policies and procedures to the Court, though the parties remain in dispute as to the adequacy and completeness of those policies. Throughout the term of the Special Master's involvement, the parties have maintained a reasonable pace in negotiating these differences, resolving some and bringing others to the Court for resolution.

Defendants report that, during the Round, the parties have conferred on policies concerning mentally ill parolees; accommodating parolees with disabilities, including mental illness, in remedial sanctions; decision review, and community-based in-custody drug treatment;[73] the parties also considered policies for hearings when parolees are not in custody.[74] Defendants also drafted policy revisions for the use of hearsay in hearings.[75]

To the Special Master's knowledge, the parties have not determined whether all needed policies have been identified and how many require further negotiation.

§ There is adequate progress and adequate compliance on this requirement.

Appoint counsel for all parolees by Return to Custody Assessment (RTCA) stage of revocation hearing

CDCR provided revocation packets to CalPAP by the agreed upon date in 93% of cases measured, according to CalPAP data.[76] This represents an improvement over the prior Round. Data does not reflect the amount of time when packet provision was late. Deficiencies were consistently highest at the decentralized revocation unit associated with CalPAP's Madera office, in the range of 23% to 37% of its cases; California Institution for Men tended to have somewhat high numbers of late assignments but these were proportionate to its high volume. Los Angeles County Jail and Pitchess Detention Center improved significantly during the Round, with poor performance in the early months largely reversed in the more recent period. The decentralized revocation units associated with CalPAP's Sacramento and Susanville offices consistently had the strongest performance, with late assignments almost always in single digits.

CDCR's Office of Court Compliance also reviewed a substantial-sized sample, and found that 96% parolees in that sample were appointed defense counsel in a timely manner.[77]

The Special Master previously has reported the parties' and CalPAP's concerns about documents missing from packets and about notice of hearing schedules close in time to the hearings themselves (referred to as "add-ons"). The Special Master's team understands that these issues continue, although we do not know to what degree.

From all information available to the Special Master, CalPAP continues to provide exceptional services to parolees and to the state, through well-prepared representation, principled contribution to the state's policymaking and operational committees, and responsible and well-structured internal oversight.

§ There is good progress and good compliance with this requirement.

Defendants shall develop training, standards, and guidelines for state appointed counsel

No new information came to the Special Master's attention through observation or information from the parties.

If the hold is continued, the parolee will be served actual notice of rights, with a factual summary and written notice of rights, within 3 business days

As discussed in the Information Systems section above, CDCR's information system cannot accurately demonstrate the timeliness of service. As this was a planned feature of the court-ordered upgrade, the Mastership understands that this will be addressed as a priority issue among changes already requested.[78]

Data maintained by CalPAP presents a very large, reliable sample. It shows that the timeliness of service improved somewhat over the last Round:

Timely notice:	92% of the known cases[79]
Unknown:	6%

Stated differently, one can only verify that 86% of notice service was timely; the remainder may or may not have been timely.[80] Similarly, Defendants' internal review of a large, methodologically sound sample found that 93% of notices were timely.[81]

The highest numbers and percentages of late service were at the jail-based Decentralized Revocation Units (Los Angeles County Jail, Pitchess Detention Center, and Santa Rita County Jail) and there were also higher than average numbers of deficiencies at California Institution for Men, likely associated with its volume. The jail sites routinely had late service percentages in double digits. Richard J. Donovan

Correctional Facility, San Quentin State Prison, and High Desert State Prison consistently had the highest compliance percentages.

The data system now provides more information permitting better analysis of the reasons that some service requires multiple attempts before it is accomplished. Almost half of the unsuccessful service attempts occurred at one facility, Los Angeles County Jail.[82]

By far the most frequent reason recorded was that the parolee was in transit to or from another location; this occurred in about half of the cases. The parolee being out to court was the second most frequent reason. These are both obstacles that may be reduced by improving systems of communication, routines for checking information on public websites, or other mechanisms.

Fortunately, several other obstacles of concern occur at a fairly low frequency. Only 96 attempts were not completed because of the parolee's medical condition, and only 24 because the parolees were in inpatient mental health treatment. Lockdowns generally did not pose much of an obstacle, except at Los Angeles County Jail, where they interrupted 100 attempts at service.

The system does not currently show whether these attempts, or the completed service that followed them, were timely.[83] The Mastership has requested that Defendants make reporting changes to the information system to show this data.

New data system reports confirm that, when parolees are not served at all, it is generally for acceptable reasons such as their release from custody, death, or transfer out of state; of the 143 per month who were not served and no further attempt was intended,

all showed these reasons and none recorded reasons such as parolees' medical or mental incapacity, a concern in the past.[84]

Monitoring reports and the Special Master's observation generally note the service is conducted reasonably, with notice agents reviewing with the parolees their rights, charges, and expectations for the process. There are occasional parolee criticisms that contacts were rushed and insufficient. Plaintiffs' concerns about disability reviews, effective communication, and privacy and related safety risks are detailed in prior reports of the Special Master.

Substantive concerns with the notice and charge documents tend to revolve around the factual summary of the conduct and alleged violation, and whether all charges are contained in the original notice. Defendants sent out an alert to relevant staff in June 2008[85] and added a detailed training in Fall 2008 to improve parole agents' practice in providing a factual summary in the notice of charges. The training included useful examples of effective documentation.[86]

The parties take different positions regarding the need to include all charges in the original notice. Defendants argue that this is not feasible, for a number of practical reasons, and that due process is not violated in the most typical situations: when additional charges are made available by the time of attorney appointment, or when a parolee's liberty interest is lessened by virtue of a confirmed violation on another charge. Plaintiffs contend that adding charges after notice prejudices the ability to prepare a defense, and undermines the requirement and its purpose.

Both agree, however, that it is desirable to lessen the occurrence of supplemental charges when those charges were known or reasonably easily discoverable by the parole

agent. Defendants' recent training emphasizes this point and gives guidance on more effective practice in identifying such charges.[87] The training on factual summaries and thorough preparation in charging a violation are good steps toward improving due process for parolees facing revocation.

Staff report that they attempted many methods to have the information system capture timeliness as to cases with supplemental charges and have not yet been successful.[88] The system newly is able to report the frequency of these cases, and it indicates that there are supplemental charges in about 2% of revocation proceedings.[89] There may be a distinction between these cases and those where charges were added after notice but before the original probable cause hearing date, as the latter tend to be reported at a much higher percentage in monitoring reports.

§ There is adequate progress and adequate compliance on this requirement.

Counsel shall have timely access to all non-confidential reports, documents, and field files

CalPAP data shows one objection during a revocation hearing based on an attorney being denied access to a field file, and eight objections concerning failure to provide requested or subpoenaed documents.[90] Three of the objections were granted and six were denied. Otherwise, no new information came to the Special Master's attention through observation or information from the parties.

§ There is adequate progress and compliance on this issue.

Parolee's counsel shall have the ability to subpoena and present witnesses and evidence under the same terms as the State

The Special Master received no new information on point from observation or from the parties during this Round.

Hearsay evidence must be limited by parolees' confrontation rights under controlling law. Defendants are to preserve this balance in hearings and to provide case law-based guidelines and standards.

The Special Master held a fact-finding hearing in December 2007 and, pursuant to the Special Master's Report and Recommendations, this Court ordered a revision of policy and procedure consistent with the reading of the law captured in the Special Master's report; a plan for training Deputy Commissioners and Paroles Division staff initially and in continuing education; and plans for setting minimum standards for Deputy Commissioners conducting revocation hearings, and for evaluating those hearing officers.[91]

During this Round, the Defendants appealed that Order and sought stays, which were denied by this Court and, on June 20, 2008, by the Ninth Circuit Court of Appeals. In compliance with the Order, Defendants produced draft policies and procedures in mid-July 2008.[92] Plaintiffs commented on them two weeks later.[93] To the Special Master's knowledge, the policies have not progressed further in the subsequent two months.

CalPAP collects information concerning the confrontation rights objections made during hearings, whether they are sustained, what remedy results, the reasoning recorded in Defendants' data system, and the individuals involved. This forms a solid foundation

for assessments of whether confrontation rights are preserved in hearings, a feature of this Court's Order.

It appears that work toward the other components of the Order is not underway, six months after the Court's March 2008 Order. Intervening factors include the months during which stays were sought, priority action devoted to others of this Court's orders, and the fact that finalized policies and procedures are a precondition for several other components. Nevertheless, with no stay in effect, Defendants should proceed with implementing this Order.[94]

The data collection provides one window into practice. It shows 551 hearsay objections – occurring in about 12% of revocation hearings – over the four months that data were consistently collected and compiled.[95] About 77% of the objections were granted, and generally the evidence was excluded or the charge dismissed. In a handful of cases (2%), the ruling was reported as having no impact on the hearing or the hearing was postponed for an opportunity for the declarant.to testify.

CalPAP's reporting captures the Deputy Commissioners' reasoning when it was recorded electronically and when the objections were denied. Because it does not record reasoning when objections were granted – the majority of cases -- this tracking serves a limited purpose in illustrating whether the relevant balancing test is being employed correctly. However, among the 95 denials that could be analyzed,[96] the correct balancing test – the importance of the parolee's interest in confrontation weighed against the state's good cause for not producing the witness – is only clearly reflected in three cases. Deputy Commissioners' notes suggested they commonly decided the question based on good cause for the witness' absence alone, or in combination with reliability of, or

corroboration for, the evidence. In almost ¼ of the cases, the Deputy Commissioner did not record any reasoning. At times, Deputy Commissioners described rationales that do not appear to be supported by any of the interpretations of current case law that the parties have advanced or that the Court has endorsed. There were no clear patterns by individual or over time.

The CDCR self-monitoring team has begun monitoring Deputy Commissioners' knowledge of the *Comito* balancing test, an important improvement in oversight.[97] Staff say they interview hearing officers to determine their knowledge on point, and document every instance of a hearsay-related objection observed, noting whether the balancing test is applied; whether there is a ruling; and the adequacy of documentation of the objection, analysis, and outcome.

To date, this has had limited reach as self-monitoring reports for the Round reflect six hearings in which *Comito* objections were raised.[98] CDCR indicates that hearing officers' supervisors are notified if there are deficiencies and the reports contain two recommendations for change in practice. Staff report that they have not analyzed or followed up the information contained in the CalPAP spreadsheets discussed above.[99] It is problematic that there is no clear indication that these actions have translated into guidance, correction, or supervision for those known to have applied the standards incorrectly.

- Although the first draft of policies and initiating monitoring are positive developments, these are outweighed by the lack of subsequent action to implement the Court's Order and the apparent failure to address poor practice in the field that is incorrect under any standard. There is poor progress and compliance at this time.

Monitoring by Plaintiffs "as reasonably necessary"

While contentious in the past, the parties' agreements concerning monitoring of decentralized revocation units, parole units, CalPAP offices, and document productions were executed smoothly during this Round.

New issues arose with the addition of new remedial sanctions programs. Parties are working to reach agreement regarding monitoring standards for Plaintiff community-based ICDTP site visits. Several efforts have been made to develop a process that results in high quality monitoring and does not place an undue burden upon the private (often non-profit) provider. Several agreements have been reached in this area and there are still areas of disagreement. Plaintiffs submitted a draft proposal for the Defendants' review at the time of this writing.[100]

Initial concerns were raised by Defendants regarding what type of information the community-based providers were expected to provide for Plaintiff monitoring tours, how much of the provider time must be dedicated to the monitoring activity, the style in which questioning of providers occurred, and how many tours were reasonable to undertake in one time period. Defendants raised these issues out of their desire not to lose any providers because of the provider's potential unwillingness to be monitored. Many of these issues have been resolved.[101]

Agreement has been reached regarding the number of tours that can occur in a day and generally what type of questions can be asked. Plaintiffs provided a list of questions for review by Defendants from which Plaintiffs typically ask some but not all of the questions while on a monitoring tour. Plaintiffs have also agreed to try not to make the questioning feel too threatening. Disagreements still exist about how much copying is

reasonable to expect of a community-based provider and how much time is reasonable to request for monitoring of the community-based provider.

- § There is adequate progress and adequate compliance on this requirement.

Other Permanent Injunction requirements:

Expedited probable cause hearing shall be held upon sufficient offer of proof that there is a complete defense to all charges

Staff report that data system changes more prominently present a feature to note when an expedited hearing has been requested and when it occurs, and that Deputy Commissioners were trained on that feature. New information reports capture the dates of a request and hearing, permitting an analysis of timely responses to requests.[102] As has been true for several Rounds, Defendants and CalPAP continue to report very few requests are made for expedited hearings; CDCR's information system reflects one such hearing during the Round. [103]

Plaintiffs are very troubled by the absence of known expedited hearings and a mechanism to carry them out, citing the potential unnecessary additional days to hearing for parolees with an absolute defense and importance of this requirement during negotiations of the Permanent Injunction.[104] They argue that this requirement should be addressed with much more urgency and have cited this as one of their top priorities for this time period.

- § There is some progress on this requirement. The Special Master is unable to assess compliance.

The parole officer and supervisor will confer within 48 hours to determine if probable cause exists to continue a hold

Data reports now give a much more complete picture of the activity at this step,[105] and they verify that CDCR continues to be very timely in completing the probable cause determination. Confirming the impression of prior Rounds, this step is completed within timeframes 98% of the time, and 99% of cases are completed timely or within one additional day.[106] Of the few late cases, a significant proportion took more than twice the required time to accomplish and occasionally appeared extended for weeks. No institutions stood out as particularly timely or untimely at this step.

Similarly, Defendants' internal review of a large, methodologically sound sample found 97% of probable cause determinations to be timely.[107] A question remains regarding how often this determination is made without a direct conversation between staff.

§ Progress remains steady and there is good compliance on this requirement.

Final hearing within 35 days of the placement of the parole hold

In assessing this requirement, there are a number of considerations. The system must consistently provide hearings timely to the great majority of cases. It must also function to provide hearings timely to special populations, sometimes small groups whose circumstances dictate counting timelines differently or suspending and resuming proceedings once conditions have been met. In operation, the hearings must provide due process, satisfying questions such as fairness, opportunity to be heard, elements of the violation proved sufficient for the applicable standard, and consideration of appropriate sanctions.

The number of revocation hearings dropped dramatically during this Round. In contrast to the previous Round's monthly average of open and closed cases around 2,400, the most recent period saw an average of about 891 hearings being handled monthly.[108] This is consistent with substantial increases in cases being resolved at probable cause hearing and in use of remedial sanctions, and other factors likely contribute as the differences do not fully correspond.

Timeliness

CDCR made substantial gains in being able to demonstrate its compliance with revocation hearing timeliness requirements. Data system changes permit an improved view into revocation hearings, but the picture remains incomplete. To understand whether these hearings were timely, one must be able to assess the time to hearing for:

- mainstream cases completed according to the usual *Valdivia* standards
- mainstream cases pending and handled according to the usual *Valdivia* standards
- extradition cases handled according to the *Valdivia* standards calculated from arrival in California, rather than hold date – completed and pending
- activated optional waiver cases, handled according to the usual *Valdivia* standards calculated from the date of activation -- completed and pending
- cases held while the parolee is not in custody, determined soon after the hold was placed and calculated, for now, at 60 days after the hold -- completed and pending
- cases held while the parolee is not in custody, ordered at a probable cause hearing and calculated, for now, at 60 days after the hold -- completed and pending
- cases where supplemental charges are brought after original charges are in process, timing not established

Data system capabilities were expanded to show time to hearing for more of these categories than in the past.[109] Additionally, it newly can show total numbers of cases in most of these categories.[110] These are important improvements.

Because of these improvements, one can determine a 97% timeliness rate for the 2,674 revocation hearings held for extradition cases, not in custody referrals, and mainstream cases, including pending mainstream cases. When adding those held within three days after the deadline, the rate rises to 98% compliant or nearly so.[111] There were 60 cases substantially more late than this. Late extradition cases did not tend to be close to the deadline; generally, they were shown as three weeks to eight months late. Late not-in-custody hearings also tended to miss the mark by a wide margin, with some cases heard two and one-half months after the expected time.

Printouts suggest that pending cases for the non-mainstream populations not accounted for are relatively small.[112] The volume of activated optional waivers may be an exception, and this is troubling as a snapshot suggests that those cases are late at a much higher rate than others.

Over a four-month period, attorneys raised 49 objections that the revocation hearing timeline had been violated, according to CalPAP statistics; only 18 were granted.[113] While it is difficult to reach conclusions without knowing more about the facts of the cases, this raises troubling questions.

Special populations

When optional waivers are activated, the parties have agreed that a hearing must take place within 35 days of activation. The data system shows that, among the 145 activated optional waiver cases pending at the time of this writing, 30% are late for their hearings.[114] This was particularly prevalent at Los Angeles County Jail, both by absolute numbers and by percentage.[115] At several institutions, cases appeared overdue two months or more. The data system cannot retroactively capture the timeliness of

completed hearings for this population, but Defendants have committed to creating such a report. If this picture is representative, much work is needed to ensure that activated optional waiver cases are provided due process through timely revocation hearings.

Some other specialized populations bear further discussion. When a parolee's history contains a statutorily defined serious and violent crime, CDCR labels the parole revocation case Priority. If such cases have not been heard within the *Valdivia* timeframe, Deputy Commissioners commonly authorize those cases to be heard late, rather than dismissed, on the basis that public safety is of particular concern. The parties acknowledge that this does not qualify as good cause for exceeding the timeframe. Plaintiffs object to this practice, are concerned about how frequently it happens, and advocate putting in place mechanisms that accelerate the scheduling of these cases to ensure they are heard timely and Deputy Commissioners are not put in the position to make this choice.[116]

The CalPAP data system tracks the frequency of Priority cases and their timeliness. During this Round, it appears that 23% of revocation actions involved Priority cases according to this definition. Of those, 2,046 went to revocation hearing over a seven-month period, and 6% of those exceeded the deadline, about twice the rate, but a few percentage points, more than the rest of the population.[117]

Substantive due process

For a more complete description of the operations and substantive issues in revocation hearings, please refer to earlier reports of the Special Master, particularly the Fourth Report. A few issues are discussed here.

Hearing officers' handling of objections is sometimes unclear. Over a four-month period, objections were raised in 478 cases.[118] Roughly 30% of the objections were granted or sustained and, while 41% of those resulted in the exclusion of disputed evidence and/or dismissal of charge, it is unfortunate that Deputy Commissioners' documentation was unclear as to what effect, if any, the ruling had in the majority of the objections granted.

On the other hand, there is evidence of Deputy Commissioners making use of dismissals for due process reasons. An average of 208 cases per month were dismissed, according to a new data system report.[119] These occurred at probable cause hearing or revocation hearing and represented 3% of the cases that reached those steps. The great majority of dismissals were for insufficient evidence; there were also dismissals for a witness' failure to appear and/or pursuant to a confrontation rights objection, lack of jurisdiction, an element of the violations not proved, or hearing timeframes being exceeded. A handful were dismissed for mental health reasons. By policy, some holds are released in favor of another jurisdiction's hold. Others are not truly dismissals, but closing out one hold in favor of another for absconding because the parolee did not appear for his not-in-custody hearing.[120]

- There is adequate progress and adequate compliance on this item.

By July 1, 2004, an assessment of availability of facilities and a plan to provide hearing space for probable cause hearings

As noted in the prior reports of the Special Master, CDCR has had facilities for hearings in use long term in its decentralized revocation units and the contract county

jails. In the two exceptions, parolees are transported to a Reception Center or a courthouse for hearings; during this Round, Defendants report they negotiated onsite arrangements at a third location that had not previously permitted them.[121] The Special Master and the parties' monitors have observed hearing facilities at many of the locations throughout the state and, with rare exception, have found them to function well for this purpose. Plaintiffs have raised concerns about noise, visibility, and privacy at some institutions, particularly for other functions such as notice and attorney-client consultation.

§ There is good progress and good compliance on this requirement.

By July 1, 2005, probable cause hearings shall be held no later than 10 business days after service of charges and rights

The number of probable cause hearings continued to climb. Where an average of 7,312 hearings were completed each month of the last Round, that average climbed to 8,081 this Round.[122] It appears that the data system can now generate reports on all relevant categories of cases, giving confidence in these and the following numbers.[123]

These probable cause hearings occurred timely 96% of the time, and 98% were heard timely or within an additional day.[124] That left 511 hearings completed later, some appearing as much as two to seven months late.

During self-monitoring, the Office of Court Compliance found timely hearings at a rate of 94% in a substantial-sized sample, and 96% were held timely or within an additional day.[125]

Over a four-month period, attorneys raised 18 objections that the probable cause hearing timeline had been violated, according to CalPAP statistics; *none* were granted.[126] While it is difficult to reach conclusions without knowing more about the facts of the cases, this raises troubling questions.

The system is newly able to demonstrate that 12% of probable cause hearings conclude in optional waivers, a process by which parolees with pending criminal charges conditionally accept a revocation term with the option of returning for a revocation hearing at a later date.[127]

For a more complete description of the operations and substantive issues in probable cause hearings, please refer to earlier reports of the Special Master. A few aspects are highlighted here.

Monitors continued to observe that certain Deputy Commissioners do not expressly discuss probable cause during these hearings.[128] The Special Master and monitors noted this practice in at least three locations in 2006 and 2007; it continued in at least one of those facilities and it was reported at two additional locations during this Round.[129] This is extremely troubling.

On the other hand, Defendants paid attention to another practice that impacts due process, that of listing arrests and convictions in such a way that Deputy Commissioners might treat them similarly in assessing a parolee's history and, thus, potentially unfairly weighting a decision concerning the need to return to custody or the length of that term. Defendants provided additional training in Fall 2008 to improve documentation so that this possibility is reduced.[130] This is a helpful step in improving due process.

The parties have been in dispute concerning whether probable cause hearings satisfy due process if they are held by telephone with the Deputy Commissioner in one location and the parolee and attorney in another. Tracking, which the Special Master verified previously is maintained using valid methods, indicates that the majority of jail locations, and a few prisons, held a telephonic hearing from time to time, but the frequency for the system was significantly reduced from prior Rounds.[131] The total of 196 telephonic hearings represented only 0.4% of all probable cause hearings. Only High Desert State Prison and Merced and Stanislaus county jails used this method more than a handful of times.[132] The parties have asked the Special Master's team to conduct an investigation into the practice of telephonic probable cause hearings and its adequacy. Both parties were contacted separately in late September seeking their input into what they would like to see in this investigation and the process they prefer. The analysis of hearing practice is pending.

§ There is adequate progress and adequate compliance on this requirement.

Defendants shall develop and implement policies and procedures for designation of information as confidential consistent w/ requirements of due process

While CalPAP indicates that it receives some documents redacted in excess of policy, making preparing a defense more difficult, it also notes that this tends to be a localized problem. It appears of note at the facilities associated with CalPAP offices in Dublin, Los Angeles, Sacramento, San Diego, and Wasco.[133] In general, attorneys believe that confidential information is handled reasonably.[134] Defendants report, and some CalPAP offices confirm, that this mostly occurs when other agencies provide documents

with more redaction than permitted by policy, and that CDCR provides that copy to the attorneys while requesting a replacement copy from the sending agency. Defendants also provided additional training to parole agents in Fall 2008 to reinforce the correct policy.[135]

There were also three recorded objections at hearings concerning evidence designated as confidential.[136]

§ There is good progress and adequate compliance on this requirement.

Defendants shall assure that parolees receive effective communication throughout the process

This area affects parolees with hearing, visual, or speech impairments; speakers of languages other than English; those with limited literacy; and parolees with cognitive limitations, including those generated by mental illness. Defendants' structure to address these needs involves maintaining a database of known disabilities; requiring staff to check the database and paper files, and to assess needs, at each step of the revocation process; providing reasonable accommodations; and documenting new disability information, the reviews, and the accommodations.

For those needing language assistance, in-person translators were hired an average of 119 times per month, according to Defendants' documents.[137] A large proportion of translation is provided through phone services. Defendants report that they provided a list of legal terms to Cyracom, a provider of translation services in use during the Round, to increase the effectiveness of the translation.[138]

Another report shows usage of sign language interpreters 53 times, principally at probable cause hearings, during an eight-month period.[139] This is about one-third of the occurrences for a similar period in the prior Round; it is not practical for the Special Master to discern whether there was any unmet need. A small handful of cases suggest possible failures in providing the service.[140] The report does not capture availability of this service during notice service and attorney consultation, but certainly demonstrates that there is use of these services in some steps of revocation proceedings.

Defendants are required by the Court in *Armstrong v. Schwarzenegger* to maintain a database concerning prisoners' and parolees' disabilities, to consult it at different times in the revocation process, and to add to it when applicable. CDCR provided additional training to parole agents in Fall 2008 to enhance the use of this database.

In revocation packets, parolees' disabilities are documented on forms referred to as "1073s" and accompanied by source documents. Although they are in routine use, there has been a pattern of missing documents, and the rate has remained unchanged for several Rounds. The disability form was missing in 4% of files, and the source documents absent in nearly 20% of relevant files, according to CalPAP data.[141] This potentially compromises providing reasonable accommodations, effective communication, and timely contacts and hearings. The problem continued to be principally concentrated at California Institution for Men and Los Angeles County Jail. The best performance was typically found at facilities associated with CalPAP's offices in Madera and Susanville; Dublin improved during the Round with the forms, and Tracy nearly eliminated missing source documents.

Another printout gives a window into the practice of providing accommodations. At four institutions comprising 37% of the revocation actions in the state, the document shows 14,782 accommodations given.[142] The Special Master is unable to discern whether this met all need, but this clearly indicates accommodations made available often. About 20% of those were previously not identified but nevertheless provided. It is commendable that Defendants were able to meet these parolees' needs. At the same time, this number of spontaneously generated accommodations raises a question of whether the system to identify and carry forward knowledge of disabilities is operating as it should. On the other hand, this rate of newly identified disabilities is much improved from the prior Round.

CDCR continues to provide disability-related training to a variety of field staff and supervisors, including two workshops offered during this Round.

- There is adequate progress and adequate compliance on this item.

Forms provided to parolees are to be reviewed for accuracy, simplified, and translated to Spanish

The parties continued to negotiate concerning certain forms, and Defendants report agreed-upon revisions to the notice of parole revocation rights, the report of in-custody misconduct, and conditions of parole, and a regulation change for the latter is pending.[143] Forms have not been translated into Spanish or alternate formats as required.[144]

While the desire to have forms finalized before translation is understandable, there have been many forms in use for several years without the simplification and

translation needed for some parolees to understand them. This requirement is long overdue.

§ Progress has been limited during this Round and compliance is poor.

Upon written request, parolees shall be provided access to tapes of revocation hearings

Defendants keep a log, which shows 560 tape requests during a seven-month period.[145] Of those requests, more than 99% were answered, or were pending, within a 30-day timeframe, which represents a slight improvement over the previous Round. Only three requests were not processed timely, with the longest outlier taking 51 days. There were six cases where the same person or entity made a second request for the same tape, but in each, the record indicated the tape had been sent; it is unclear whether the repeated requests reflect mail delays, tape quality, or other reasons.[146]

§ There is good progress and good compliance on this requirement.

At probable cause hearings, parolees are to have the ability to present evidence to defend or mitigate the charges or proposed disposition

No new information came to the Special Master's attention through observation or information from the parties.

On or before the fourth business day, the Parole Administrator shall review the packet to determine whether the case is sufficient to move forward and whether remedial sanctions may be appropriate

Information system reports indicate that Parole Administrators reviewed 61,699 cases during this seven-month period, a rate significantly lower than the prior Round.[147]

An additional 975 cases appear as sent to the next step with no action by the Parole Administrator. The Special Master called for an examination of these apparent omissions in his third and fourth reports; staff report that they did not undertake this, though they did highlight this requirement in a Task Force meeting. This number decreased dramatically, from a rate of 424 per month to 139 per month. Los Angeles County Jail was responsible for nearly 25% of cases without Parole Administrator action; others with the highest frequency included California Institution for Men, Richard J. Donovan Correctional Facility, and Wasco State Prison. The women's institutions did particularly well in this regard.

The data system purports to track timeliness for this requirement, but it does not serve this purpose well. Staff did not describe any changes to this function in the recent data system upgrade. CDCR has yet to demonstrate timeliness on this requirement; either changes to the system's logic, or auditing or another method of demonstration, will be necessary.

§ There is good progress but unknown compliance regarding this requirement.

Defendants shall maintain staffing levels sufficient to meet all obligations under the Order

During the Round, the Board investigated and rectified longstanding uncertainties about the number of its funded positions, much of it dating back to the CDCR reorganization.[148] The process resulted in a recognition that there were substantially fewer funded positions than previously thought in some categories, and small reductions or additions in others. The staff categories most affected were Deputy Commissioners, with a loss of 13 positions; clerical staff, who gained almost 15 positions; and

correctional counselors, whose ranks increased by 9 positions.[149] In a different effort, the divisions were able to expand positions in some categories because workload-driven increases previously authorized became effective during this Round. Collectively, there was a net increase for the divisions of 11.5 positions.[150]

The number and rate of vacancies remained fairly constant. In 15 staffing categories, there were none at all. Rates remained high, but improved, for some clerical categories,[151] but there was only one training officer for three positions. Deputy Commissioner vacancies are of particular concern given the critical nature of that role; in addition to a loss of 13 positions, 15 were vacant and another several covered vacancies in supervisory positions. However, the Board reported having 52 retired annuitants available to cover those vacancies and those of the Associate Chief Deputy Commissioners.

As in many state agencies and among entities who contract with them, there were substantial concerns about the effect of delays in reaching a state budget. In response to a directive to cease using retired annuitants, the Board acted quickly to obtain an exemption to ensure that those part-time employees could continue to staff revocation proceedings and operations. Attorney panel administration, perhaps the Board's most pivotal contract, continued uninterrupted. The Special Master did not undertake an examination of whether there were impacts on any other contract services or categories of staffing, but also did not observe any effects.[152]

§ No progress is apparent. Compliance is adequate.

Agreed-upon mechanism for addressing concerns regarding individual class members and emergencies

CDCR's log indicates that Plaintiffs employed this mechanism on 129 occasions during the Round.[153] In 61% of those cases, Defendants responded within a month, as agreed by the parties; this is a substantial drop in timeliness. The remaining 39% seems to reflect four separate periods during which a larger number of requests were submitted; these cases were answered in six to seven weeks. Concerns were most often generated from California Institution for Men, Deuel Vocational Institution, Los Angeles County Jail, and San Quentin State Prison.

The greatest numbers of requests concerned the following issues: potentially late revocation hearings or probable cause hearings; treatment of optional waivers; delays in accessing drug treatment programs; and ADA accommodations. Other topics included confrontation rights, over-detention, requests for hearing tapes, and mental health issues. Of the 129 logged entries,[154] 87 requests were resolved either by providing the requested information, taking the requested action, or forwarding the information provided. Defendants defined 21 requests as unfounded or outside the scope of *Valdivia*. With the remaining 25 requests, which consist entirely of concerns about late revocation or probable cause hearings, CDCR determined that good cause justified the delay, or an exception was made for public safety reasons,.[155]

§ There is adequate compliance on this requirement; progress is unchanged.

Appeals

Defendants provided the Office of the Special Master and Plaintiffs with a draft revised decision review policy on March 7, 2008.[156] A meet and confer was held with parties on June 17, 2008 to discuss the proposed policy. Discussion ensued regarding the

proposed policy and the more informal process used in the past. Defendants indicated that the process is used most often when there are errors of law. The Plaintiffs and CalPAP representatives expressed concern that the proposed policy expanded the process beyond past practice.

The parties agreed that Defendants would send Plaintiffs a sample of cases that went to decision review. After reviewing the sample, Plaintiffs were given a month to provide a proposed draft policy to Defendants. Defendants provided the sample of cases on August 1, 2008.[157] Plaintiffs requested an extension for development of the draft decision review policy.

- There is adequate progress on this item.

Revocation Extension Proceedings

There were major changes during this Round concerning revocation extensions, the process by which alleged in-custody misconduct is subject to a hearing and decision about whether to extend a revocation term. The Special Master understands that policies and procedures were implemented by the Board and institutions staff in May 2008, and by the Paroles Division in September 2008.[158] The policy makes much more systematic the procedures for providing notice and hearing, and is aimed at improving the times from discovery of the alleged conduct to hearing.[159] Defendants have also designed information system methods to track and troubleshoot pending cases, and to demonstrate compliance with the timelines,[160] which are largely parallel to those for the revocation hearing process.

CalPAP data indicates there were 582 revocation extension actions during the Round, an average of 97 per month.[161] From a review of the CDCR information system, it is not clear whether staff have adopted much of the data-gathering features.[162]

- There is good progress and adequate compliance on this item.

Whether revocation hearings are held within 50 miles of the alleged violation

CalPAP data captures 13 hearings during the Round in which the revocation hearing was set outside the 50-mile limit (1/5% of hearings), a rate similar to the prior Round.[163] All but one were set over the objection of the parolee and only two objections were granted; one resulted in a dismissal and the other rescheduled the hearing an additional month hence. Some of the denials were based on the parolee calling no witnesses or safety concerns, where the reasons for others seemed unclear or misplaced. Nevertheless, the vast majority of hearings are held in compliance with this requirement.

- This issue remains compliant at this time.

Interpretation Issues:

The following issues were noted in prior reports of the Special Master and remain the subject of dispute or negotiation.

Issues related to timing of notice or hearings

Adequate notice to parolees of the dates of their revocation hearings

No new information came to the Special Master's attention through observation or information from the parties.

Parolee timeliness waivers, including whether they are voluntary, parolee attorneys are requesting them at a reasonable rate, and whether hearings are resumed after a reasonable time

New data system reports appear to more reliably capture some aspects of information concerning timeliness waivers. Among a set of 158 waivers pending at the time of the printout, [164] the length of time requested was fairly evenly distributed between one, two and three months, with a handful at a shorter timeframe and the same number requesting four to six months.

Plaintiffs have expressed concern that attorneys may take these waivers when faced with a choice of proceeding against hearsay evidence or postponing for more competent evidence, or in other undesirable situations. No indications of such occurrences came to the Special Master's attention during this Round. As part of the picture, CalPAP staff report that some attorneys request time waivers because, in some jurisdictions, it is more advantageous in criminal courts than taking optional waivers.[165]

The CDCR main data system now contains a feature to prompt the scheduling of a new hearing within the new timeframe set by a waiver, a helpful addition. The system cannot demonstrate whether the rescheduled hearing took place within the permitted time.[166]

- There appears to be reasonable practice as to parolees' attorneys taking waivers.

Length of time to hearing when a parolee is subject to extradition

Continuing oversight practices initiated in 2007, CDCR significantly improved the timeliness of notice for parolees brought back from other states. After implementing

new practices in response to poor audit results, the self-monitoring unit continued to conduct sound audits at two points during this Round.[167]

In each audit, there were a small number of cases that appeared not to have been served notice at all, but the audits did not comment; in future, these cases should also be examined. About 5% to 7% of notices were served late – a very large reduction from earlier audits – and the length of delay was much less. More than half were served the following day, and the longest time to service was five days; in the past, it was twice as long. Auditors did not find good cause for the late service. The likelihood of impact appeared low, in that most parolees had at least one week after service to prepare a defense and those probable cause hearings generally were timely.[168]

The studies found that 6% of the probable cause hearings were late for this population and no good cause was found except in one case. This was constant over time. The length of the delay, however, worsened. In the beginning of the Round, most hearings were held the following day, by the second audit, fewer than half were held that quickly and a hearing could take as long as nine days. All recorded revocation hearings were timely, an improvement.

Defendants also newly instituted a data report for this population. Because of previously described database problems with notices of rights, one cannot determine their timeliness. Probable cause hearings captured in that report appear to be timely 95% of the time, with exceptions occurring most often at California Institution for Men, Los Angeles County Jail, High Desert State Prison, and Richard J. Donovan Correctional Facility.[169] About 98% were heard timely or within 2 days after the deadline. The remainder, however, were held 3 to 39 days late.[170] Since this data report covers the period after the

most recent extradition study, it appears that, when these hearings were late, the time to hearing continued to worsen.

In the data system report, 5 revocation hearings were held late (9%), and all were shown as very late (19 to 239 days late).[171]

- Because of the improvements in timeliness of notice, there is good progress on this item; there is adequate compliance with *Valdivia* timeframes.

Length of time to hearing when a parolee is allowed to remain "not in custody"

Data system changes now permit an examination of some information about Not In Custody hearings. About five such hearings were ordered per month when the parolees were in custody but released to await hearing.[172] About 1/3 of those were ordered because the deadline for hearing was approaching or had been reached or exceeded. Reports do not capture whether the subsequent hearings were held timely.

Not In Custody hearings initiated without the parolee being taken into custody occurred about 42 times per month.[173] Defendants are applying a standard of 60 days to revocation hearing for this population, based on the lessened impact on parolees' liberty interest and, presumably, on language found in *Morrissey;* the parties have not agreed to any timeframe exceeding 35 days. About 93% of these cases were timely according to Defendants' 60-day standard; printouts indicate about half of the late cases were held five days after the deadline, while the other half took two additional weeks to two and one-half extra months to complete.[174]

The parties also continue to discuss revisions to policies and procedures for this population. Plaintiffs provided input early in the Round, and it appears discussions have not proceeded since that point.

- There is reasonable progress and adequate performance on this item.

Appropriate remedies and responses when the state does not meet its timeline obligations in an individual case

No new information came to the Special Master's attention through observation or information from the parties.

Issues related to attorney representation

Parolee rights waivers before being appointed counsel

No new information came to the Special Master's attention through observation or information from the parties.

Whether there are sufficient provisions for attorney-client communications to be confidential in some locations

This remains a frequent concern raised in Plaintiffs' monitoring reports for various facilities, both as to attorney-client contacts and notice of rights and charges. Defendants disagree that there is an obligation to ensure private communications as a feature of the Permanent Injunction.

Whether state employees and witnesses will be provided with attorney representation during hearings

No new information came to the Special Master's attention through observation or information from the parties. Plaintiffs object that victim advocates are present in

hearings without policies and procedures defining their role and guiding CDCR staff in handling such hearings.

Evidentiary questions

Timely provision of all appropriate evidence to parolees' attorney

Over a four-month period, attorneys objected to new evidence being presented at a hearing on 35 occasions, according to CalPAP data. About 43% of those objections were granted.[175]

Whether parolees may be removed while fearful witnesses testify, subject to the parolee's attorney's examination, but not the parolee's direct confrontation

No new information came to the Special Master's attention through observation or information from the parties.

Summary

Generally, statewide improvement has been made in remedial sanctions beds/slots available and in demonstrating timeliness for several key requirements. However, the Los Angeles County Jail site, with its attendant substantial numbers, continues to drag down compliance figures in several areas, not the least of which are: late serves, activated optional waiver hearing timeliness, effective communication, and absence of Parole Administrator review. The Defendants must address the issues at the Los Angeles County Jail site if they are to reach compliance in the critical due process issues.

Plaintiffs and Defendants have done an excellent job of working together to resolve problems regarding remedial sanctions throughout this Round. Plaintiffs have brought concerns and issues to Defendants quickly and Defendants have responded to the concerns raised expeditiously. Plaintiffs have been flexible and have demonstrated a willingness to understand and recognize operational challenges and limitations. Defendants have been more willing to share information and have been more proactive in the crafting of possible solutions to problems.

The parties have reviewed the draft of the instant report, submitted comments, and met with the Special Master's team. The Special Master's team made revisions responsive to those comments. Plaintiffs additionally proposed investigations, tracking, and closer monitoring of a variety of requirements; where the Special Master declined to adopt those suggestions, it was generally on the basis that Department resources are best concentrated on high impact remedies at this time, or that there was little indication that small-scale breakdowns were anything more than an anomaly. Those issues Plaintiffs highlight, however, do bear observing, with an expectation that the parties will return to addressing them in future.

Substantive compliance -- critical to due process and to reaching substantial compliance -- can be summarized as:

Good compliance:

- Compliance with the Remedial Sanctions Order:
  - Policies and procedures, training
  - Out-of-county transfers
  - ICDTP – mainstream, dual diagnosis, and disabled participants
  - Interim availability of programs
  - Electronic in-home detention
- Compliance with the November 13, 2006 Order concerning information systems

- Attorney appointment
- Unit Supervisor and agent conference
- Facilities
- Hearing tape requests
- 50-mile limit

Adequate compliance:

- Consideration of remedial sanctions at each step
- Remedial sanctions: alternative placement in structured and supervised environments and self-help outpatient/aftercare programs
- Compliance with the January 14, 2008 and August 8, 2008 Orders concerning mentally ill parolees
- Compliance with the November 13, 2006 Order concerning internal oversight
- Policies and procedures
- Training, standards, and guidelines for state appointed counsel
- Notice of rights and charges
- Access to non-confidential documents and field files
- Evidence under the same terms as the State
- Present evidence to defend or mitigate the charges or proposed disposition at probable cause hearings
- Probable cause hearings
- Designation of information as confidential
- Effective communication
- Revocation hearings
- Staffing
- Monitoring
- Mechanism for individual concerns
- Revocation extension

Poor compliance:

- Confrontation rights
- Translating and simplifying forms

Unknown status:

- Expedited probable cause hearings
- Parole Administrator review

Where quantification is possible, compliance can be summarized as:

Unit Supervisor and agent conference	98%
Notice to parolee	86%

Parole Administrator review	unknown
Timely revocation packet to attorney	93%
Disability form in attorney packet	96%
Source documents in attorney packet	81%
Probable cause hearing	96%
Revocation hearing	97% - mainstream cases, extradition 70% - activated optional waivers 93% -- Not In Custody held within 60 days
Hearing tape copies	99%

Recommendations

While the Special Master does *not* seek court orders at this time, it is strongly recommended that Defendants:

1. Address the practice of Deputy Commissioners failing to expressly consider and make findings concerning probable cause during probable cause hearings

2. Address the handling of hearsay objections when it is not consistent with any reading of the law advanced by the parties or endorsed by the Court, and expeditiously implement the Court's March 25, 2008 Order concerning confrontation rights

3. Investigate the causes of myriad deficiencies in revocation proceedings at Los Angeles County Jail and consistently work toward remedying them

4. Pay strict attention to the requirement to maintain staffing levels sufficient to meet all obligations of the Permanent Injunction

5. Investigate the cause for delay in transfer of parolees from jails and institutions to community-based ICDTP programs

Respectfully submitted,

_/s/Chase Riveland

Chase Riveland

[1] It begins with actions in June to allow for the expected initial period where data may be inaccurate while staff become accustomed to new systems and requirements.
[2] Stipulation and Order Regarding Remedial Sanctions, Apr. 3, 2007
[3] Document with computer file name Long-Term_Memo_to_Field 050107.doc
[4] Policy and Procedures for Electronic In-Home Detention (08-33), Aug. 15, 2008
[5] See EID Policy 07-06
[6] See Remedial Sanctions Order
8 This data is drawn from the Defendants' compliance report, exhibit 6 and data gathered by the Office of the Special Master from DAPO. See RMSC Weekly Count for 7-31-08 and 8-28-08 and BSARMSC 2008 2009.
[8] See citations associated with Table 1
[9] See RMSC Weekly Count 1-3-08.xls.
[10] See citations associated with Table 1
[11] This data is drawn from the Defendants' compliance report, exhibit 6 and data gathered by Office of the Special Master from DAPO. See BSARMSC 2008 2009.
[12] See BSARMSC DAPO report for July and August data
[13] See document with the computer file name FRMSC RS.pdf
[14] See Defendants' Compliance Report and DAPO Excel spreadsheet PSC 6-07 to 8-08
[15] Exhibit 7 to Defendants' Compliance Report, Aug. 29, 2008; DAPO Excel spreadsheet PSC 6-07 to 8-08
[16] See Defendants' Compliance Report and DAPO Excel spreadsheet PSC 6-07 to 8-08
[17] Compare document with the computer file name FRMSC RS.pdf with Remedial Sanction Monthly Workload for 8-08
[18] Data is drawn from the ICDTP Weekly Report issued 9/12/08
[19] Data is drawn from the ICDTP Weekly Report issued 9/12/08
[20] This includes the 200 PSAP beds
[21] Female beds are included in the totals for jail and community-based beds
[22] See 3/18/08 Preliminary Region IV ICDTP tour letter by Michael Bien
[23] Data is drawn from the ICDTP Weekly Report issued 9/12/08
[24] *Id.* and communications during meet and confer sessions
[25] Data is drawn from the ICDTP Weekly Report issued 9/12/08
[26] See Valdivia Accomplishments Memo from Rebecca Lira
[27] For a current example, see ICDTP Beds Available, All Regions, 9/19/08
[28] Examples of such concerns would be the Plaintiffs' letter of July 31, 2008 referencing the consolidated monitoring report of CIW and Defendants' Self Monitoring report of June 10-12, 2008 at Santa Rita County Jail.
[29] See document with computer file name ICDTP draft p-ps 6-10-08.pdf; letter from E. Galvan to J. Devencenzi et al. dated Jul. 10, 2008; and letter from T. Irby to E. Galvan dated Aug. 26, 2008
[30] DARS ICDTP Provider Count tracking sheet, August 5, 2008
[31] *Id.*
[32] Informal communications with Defendants
[33] See Defendants' Compliance Report, Exhibit 10
[34] See Draft Policies, June 2008; E. Galvan letter re: proposed revisions of July 10, 2008 and Defendants response to Plaintiffs letter in Irby Response of August 26, 2008
[35] See Exhibits 8 and 9 of Defendants' Compliance Report
[36] Documents with computer file names Out of County Transfer.pdf, ICDTP Region1 showing county to county transfers.xls, and ICDTP Region IV out of county.xls

[37] EID Alert, 5/27/08
[38] See e-mail from Lori-Macias Price with an example of the report.
[39] See Defendants' Compliance Report, page 9
[40] Exhibit 3 to Defendants' Compliance Report, Aug. 29, 2008; see also Section II of the Remedial Sanctions Order.
[41] See EID Audit by Region for April and May 2008.
[42] The Special Master asked that the Defendants provide additional information and reviewed the sample again. The additional information did not help to distinguish between remedial sanctions or enhanced supervision use.
[43] Exhibit 3 to Defendants' Compliance Report, Aug. 29, 2008;
[44] Informal communications with Defendants
[45] The data is derived from an analysis of the Parole Administrator Statistics, run for each DRU and spanning Feb. 1 through Aug.. 31, 2008.
[46] *See, e.g.,* Closed Case Remedial Sanction Summary, Jun. 1 through Aug. 31, 2008
[47] Briefing on RSTS update, Aug. 21, 2008
[48] Order, Jan. 14, 2008
[49] Draft REVOCATION PROCESS FOR PAROLEES UNABLE TO MEANINGFULLY PARTICIPATE DUE TO A MENTAL DISORDER (REVISED PLAN 9/22/08)
[50] Special Master's observations, informal communication with CalPAP, Defendants' Compliance Report, Aug. 29, 2008
[51] CalPAP Gap Parolee List, Jul. 18 to Sept. 19, 2008
[52] Order, Aug. 8, 2008
[53] Letter from M. Bien to L. Tillman et al. dated Sept. 19, 2008
[54] CalPAP Gap Parolee List, Jul. 18 to Sept. 19, 2008
[55] Order of Nov. 13, 2006
[56] The Information Systems section is based on Special Master observations and briefing on RSTS upgrade, Aug. 21, 2008
[57] Document with computer file name BPH Staffing 9-5-08.pdf, Defendants' Compliance Report dated Aug. 29, 2008, and *Valdivia* Staff Vacancy Report Mar. 4, 2008
[58] Special Master's observations and informal communications with Defendants
[59] Informal communications with Defendants
[60] Descriptions in this paragraph based on telephone conference with Defendants Sept. 10, 2008
[61] Descriptions in this and the following paragraph based on telephone conference with Defendants Sept. 19, 2008
[62] weekly for Deputy Commissioners
[63] monthly for Associate Chief Deputy Commissioners, weekly conference calls for Paroles Division regional leaders
[64] *Valdivia* Alerts
[65] Descriptions in this section are based on telephone conference with Defendants Sept. 10, 2008, earlier informal communications, and the Special Master's observations
[66] Audits of extradition cases dated Aug. 2007, Dec. 2007, Apr. 2008 and Jun. 2008; informal communication with Defendants noted in the Fourth Report of the Special Master
[67] Special Master's observations during Round 4, informal communications with Defendants and CalPAP staff
[68] Sources for the following three paragraphs are Special Master's team observations and informal communications with DARS staff
[69] See Valdivia Accomplishment Memo from Rebecca Lira.
[70] Descriptions in this paragraph based on telephone conference with Defendants Sept. 10, 2008
[71] *See, e.g.,* Late Case Reports contained in monthly document productions for March through May. Staff conduct these reviews beginning with the Closed Case Summary with timeliness rules applied. This assumes that all late cases culled by the timeliness rules are late with good cause; while this is generally true, there can be cases in that group, as well as late open cases, where the time afforded by the initial good cause reason has been exceeded. This review would potentially miss such cases that are untimely and need to be brought to hearing.

[72] Informal communications with Defendants
[73] Defendants' Compliance Report dated Aug. 29, 2008, and informal communication with the parties
[74] Letter from A. Mania to J. Devencenzi and K. Nelson dated Mar. 20, 2008
[75] Policy & Procedures for Assessing Hearsay Evidence, Jul. 16, 2008
[76] Date Case Assigned Compliance Report, run each month from Feb. through Jul. 2008. CalPAP data does not include several categories of cases: not-in-custody hearings, where there may not be a hold date and there is no set timeframe for attorney appointment; supplemental charges and optional waiver activations, where the attorney would already have been appointed; and extradition cases. The latter group has not been included because the date triggering the timeframes has not previously been available; that has been rectified, so the group should be included in data in future Rounds. Given the small number of cases, however (1,203 as compared with the main population of more than 45,000), the omission is unlikely to have made a statistical difference.
[77] Defendants' Compliance Report, Aug. 29, 2008, reflecting a review of 316 cases
[78] Informal communications with defendants in Sept. 2008
[79] All figures in this section arise from the Special Master's analysis of California Parole Advocacy Program, Notice of Rights Compliance Report for each of Feb. through Jul. 2008.
[80] This is derived by calculating 92% of the 94% of cases whose timeliness is known
[81] Defendants' Compliance Report dated Aug. 29, 2008
[82] Source for this and the next several paragraphs is Notice of Rights Unsuccessful, Will Retry, Jun. 1, 2008 through Aug. 31, 2008
[83] Since the data system requires staff to choose one of the existing options, staff cannot enter a different reason or when the attempt was unsuccessful without a good cause reason. Thus, these numbers likely misstate experience to some extent.
[84] Informal communications with Defendants; NOR Unsuccessful Will Not Retry, Jun. 1 through Aug. 31, 2008. However, see preceding endnote.
[85] *Valdivia* Alert contained in June monthly production
[86] Presentation titled Self-Monitoring Team and Plaintiff Tour Reports
[87] Presentation titled Self-Monitoring Team and Plaintiff Tour Reports
[88] Presentation on RSTS capabilities, Aug. 21, 2008
[89] This calculation is not precise, but it extrapolates from Closed Case Summary – Supplemental Charges Jun. 1 – Aug. 31, 2008, Closed Case Summary – Supplemental Charges Sept. 1-20, 2008, and Open Case Summary – Supplemental Charges Sept. 20, 2008.
[90] Excel spreadsheet titled Other Objections, run each month from Apr. through July 2008.
[91] Order, Mar. 25, 2008
[92] Policies and Procedures re: Assessing Hearsay Evidence, Jul. 16, 2008
[93] Letter from L. Stewart to V. Whitney et al, Jul. 29, 2008
[94] Order, Mar. 25, 2008, incorporating by reference the Recommendations language at pages 26-29 of the Report and Recommendation Regarding Motion to Enforce Paragraph 24 of the *Valdivia* Permanent Injunction
[95] Reports titled Comito Objections Denied and Comito Objections Granted, covering Apr. 2008 through Jul 2008
[96] Excel spreadsheet titled Other Objections, run for each of April, May and July 2008. The June report did not capture Deputy Commissioner notes.
[97] Defendants' Compliance Report, Aug. 29, 2008
[98] Review of all self-monitoring reports for visits spanning Feb. through Aug. 2008. *Comito* objections occurred during visits of LACJ, RJD, CIM, and Santa Rita.
[99] Informal communications with Defendants
[100] Letter from E. Galvan to N. Campbell et al, Sept. 26, 2008
[101] Sources for this paragraph and the next are Special Master's observations
[102] Presentation regarding RSTS upgrade, Aug. 21, 2008
[103] Exhibit 20 to Defendants' Compliance Report, Aug. 29, 2008
[104] Informal communications with Plaintiffs
[105] Previously, four categories of cases were not included. Two of those are now captured in unique reports, so data can be compiled for the main body of cases and these two special populations. Timeliness data for supplemental charges is not available, but a unique report shows that that group is a very small

proportion of the total (369 for 3 months) and its absence would not affect the overall numbers. It is unclear whether parolees sent to Proposition 36 treatment at the unit level are excluded from this report, as they were previously.

[106] Closed Case Summary by DRU – Case Prep Events, run monthly from Apr. through Aug. 2008 and provided in monthly productions. Closed Case Summary by DRU – Extradition, Closed Case Summary by DRU – NIC Referral, and Closed Case Summary by DRU – Supplemental Charges, each covering Jun. 1, 2008 through Aug. 31, 2008. A sample Open Case Summary by DRU, run Sept. 20, 2008, was consistent with these.

[107] Defendants' Compliance Report, Aug. 29, 2008

[108] Closed Case Summary – Hearing Events, Closed Case Summary – Extradition, Closed Case Summary – NIC Referral, each run for Jun. 1 through Aug. 31, 2008, and Open Case Summary – Timeliness Sept. 20, 2008

[109] Reports now capture timeliness for closed mainstream cases, open mainstream cases, closed extradition cases, and closed NIC referrals from the parole units.

It cannot yet show time open for pending extradition cases, activated optional waivers, NIC referrals, and NICs ordered at probable cause hearing. It cannot show time to hearing for completed NICs ordered at probable cause hearing or activated optional waivers. Without a standard to apply, supplemental charge timeliness cannot be calculated.

[110] The system can generate totals for each population except optional waivers activated and with hearings completed, extradition cases pending, and pending NIC referrals from parole units.

It is likely that these are included in Open Case Summary and Closed Case Summary, in the differences between the totals on those reports and the totals on their corresponding reports with "timeliness rules" applied. However, late cases explained by other reasons are also likely included in these differences, so one cannot identify the numbers associated with these populations.

[111] Analysis in this paragraph is derived from Closed Case Summary – Hearing Events, Closed Case Summary – Extradition, Closed Case Summary – NIC Referral, each run for Jun. 1 through Aug. 31, 2008, and Open Case Summary – Timeliness Sept. 20, 2008. For those reports not directly reflecting lengths of time for late cases, the Special Master's team drilled down on the late cases and recorded this information but did not retain those documents.

[112] Comparing a recent Open Case Summary to an Open Case Timeliness summary run on the same date (Sept. 20, 2008), the difference was 218 cases, about 8% of the total open and closed for the period reviewed. Predictably, many, but not all, of the cases comprising that 8% would be the special populations being discussed here.

[113] Excel spreadsheet titled Other Objections, run each month from April through July

[114] Optional Waiver Open Cases, Waivers Activated un. 1 through Aug. 31, 2008, report run Sept. 14, 2008. Reports do not yet capture the timeliness of hearings after optional waiver activations once those cases are closed.

[115] Of the 38 open cases, 14 were beyond timeframes. The number of closed cases during that period is not available, so one cannot make the comparison.

[116] Informal communications with the parties.

[117] Priority Case Summary, Feb. 1 through Aug. 31, 2008

[118] Excel spreadsheet titled Other Objections, run for each month from Apr. 2008 through July 2008

[119] Hearing Decision Dismiss Jun. 1, 2008 through Aug. 31, 2008. Some occurred at probable cause hearing and some at revocation hearing; because the report does not distinguish them, we will discuss them collectively here.

[120] Informal communications with Defendants, Sept. 2008

[121] Defendants' Compliance Report, Aug. 29, 2008

[122] Closed Case Summary by Dru – Hearing Events run each month from Apr. through Aug. 2008; Closed Case Summary – Extradition Jun. 1 through Aug. 31, 2008. Only some of the increase is attributable to the new ability to include extradition cases. Note that once parolees are found to qualify for Proposition 36 treatment, they are not included in Defendants' data system reports. Thus, Defendants are handling an additional, unknown but potentially large, number of actions.

[123] Previously, these categories of cases were not captured in reports and therefore timeliness was unknown for them: extradition, supplemental charges, and not in custody hearings. No probable cause hearings are

held for the latter category. Supplemental charges are treated separately and appear to be a small group in any event (see analysis of notice of rights). Extradition cases are included in these collective numbers.

[124] *Id.* The compliance rate may be slightly lower because of open cases. Neither the Special Master nor the parties conducted a systematic review. However, a sample Open Case Summary run Sept. 20, 2008 showed 1,353 cases open. This number was consistent with those observed at several points during the prior Round, so this may represent the number typically in process. On this printout, the timeliness rate was somewhat lower, at 91%, which would bring the combined percentage down one point.

[125] Defendants' Compliance Report, Aug. 29, 2008

[126] Excel spreadsheet titled Other Objections, run each month from April through July 2008

[127] Optional Waivers Taken, Jun. 1 through Aug. 31, 2008

[128] Plaintiffs' monitoring reports for site visits of SQ in Mar. 2008 and CIW in Feb. 2008 and in 2007

[129] *Id.*

[130] Presentation titled Self-Monitoring Team and Plaintiff Tour Reports

[131] Telephonic Probable Cause Hearing Summary Sheet Jan. 2008 through Jul. 2008 (using only data for the Round – Feb. 2008 through Jul. 2008)

[132] Telephonic hearings occurred there 24, 16, and 21 times respectively, over a six-month period.

[133] Excel spreadsheet titled CalPAP Unscientific Poll re: Redaction & ICDTP

[134] Informal communications with CalPAP in Sept. 2008

[135] Presentation titled Self-Monitoring Team and Plaintiff Tour Reports

[136] Excel spreadsheet titled Other Objections, run each month from Apr. through July 2008

[137] Interpreter Logs provided with monthly productions from Mar. 2008 through Aug. 2008. Usage on these invoices totaled 715.

[138] Plaintiffs' monitoring report for site visits of CIW in Feb. 2008 and in 2007

[139] Chart with the computer file name SLI Report 2-1-08 – 8-31-08.htm The chart has 61 entries, but three are duplicates for the same hearings, and five are for non-*Valdivia* proceedings, and have been eliminated. In addition to probable cause hearings, the chart showed sign language interpreters at 4 revocation hearings, 2 optional waiver reviews, and 1 revocation extension proceeding

[140] In two cases, a proceeding was repeated close in time; these were both requested by the parolees, and one was unrelated to the disability while the other appeared related, citing the need for evidence of how the parolee communicates with his parole agent. Curiously, in one, the interpreter was present but the Deputy Commissioner's notes said no ADA accommodation was needed.

Another case was more troubling. The parolee appropriately had an interpreter at a February probable cause hearing (this is misidentified as a revocation hearing in the document). He took an optional waiver; when he activated it and had an optional waiver review a month later, it proceeded without an interpreter and that went without comment in the notes. One week later, no interpreter was present for his revocation hearing, causing a two-week postponement (in which an interpreter did participate).

[141] Missing 1073 and Source Documents Monthly Report, run each month Feb. through Jul. 2008

[142] DECS Accommodations Planned vs Provided, Feb. 1 through Aug. 31, 2008. At CDCR institutions, the document reports together those accommodations provided at lifer hearings and in revocation proceedings. The four jail-based DRUs, however, report only revocation proceedings accommodations; these are Los Angeles County Jail, Pitchess Detention Center, Rio Cosumnes Correctional Center, and Santa Rita County Jail. We do not know whether this is fully generalizable to other DRUs, since practice at these DRUs may be influenced by their unique circumstances. Nevertheless, this is a very large sample of all revocation proceedings and gives some worthwhile indications.

[143] Defendants' Compliance Report dated Aug. 29, 2008

[144] Informal communications with Defendants

[145] The analysis in this section is based on Excel spreadsheet, referred to as 2008 Tape Request Log for the period Feb. through Aug. 2008

[146] Of these six cases, two involved repeated requests by a parolee and four involved requests made by CalPAP. The time between the requests ranges from one week -- likely too close in time for Defendants to reasonably have produced the tapes – to five months

[147] Analysis for this full section is based on reports titled Parole Administrator Statistics, Feb. through Aug. 2008, one run for each DRU.

[148] Informal communications with Defendants

[149] Chart in document with computer file name BPH Staffing 9-5-08.pdf; Excel spreadsheet titled Board of Parole Hearings Authorized *Valdivia* positions; informal communications with Defendants
[150] Institutions Division is not included in this calculation, but it does not appear to have undergone significant change in *Valdivia*-related positions.
[151] This was particularly evident among the Program Technician IIIs and Office Technicians. Nearly all of the Office Assistant positions were new and had not been filled yet.
[152] Sources for this paragraph were informal communications with Defendants and CalPAP, and Special Master's observations
[153] Source for all information in this section is Excel spreadsheet titled "Valdivia Problem Cases:" The analysis is of the subset of entries spanning responses from Jan. 31 through Jun. 18, 2008. In addition to the 129 entries, two problem case requests that solely concern a hearing tape appear on both Tape Request Log and Problem Case Log. These two cases are included in the statistical analysis of Tape Request Log but excluded from the Problem Case Log analysis. Thus, the statistical data in this section assume that the total number of problem case requests in this Round is 129, not 131
[154] Ten of the 129 entries raise more than one issue. Because the Log reflects separate disposition for each issue, the total number of dispositions exceeds the total number of entries
[155] 21 entries show "good cause" in the Disposition column of the Log; 4 entries show "public safety."
[156] Policy draft under cover letter from J. Devencenzi to E. Galvan, Mar. 7, 2008
[157] *See* Decision Reviews Conducted per DAPO/BPH Policy No. 07-17
[158] Defendants' Compliance Report dated Aug. 29, 2008
[159] DAPO and BPH Policy and Procedure, Feb. 20, 2008
[160] Briefing on RSTS upgrades, Aug. 21, 2008
[161] Revocation Extensions by Location, run for each month from Feb. through July 2008
[162] Special Master's observations
[163] CalPAP Revocation Hearings Over 50 Miles Feb. 1 through Aug. 31, 2008; Excel spreadsheet titled Other Objections, run each month from Apr. through July 2008
[164] Open Case Summary Time Waiver by DRU Jun. 1 through Aug. 31, 2008
[165] Informal communications with CalPAP, Sept. 2008
[166] Briefing concerning RSTS upgrades, Aug. 21, 2008
[167] The discussion in this section relies on the Special Master's analysis of four CDCR audits of extradition cases dated Aug. 2007, Dec. 2007, Apr. 2008 and Jun. 2008
[168] The exceptions were two parolees who only had two days between service and hearing, a hearing that was one day late, and a hearing that was seven days late.
[169] Closed Case Summary by DRU – Extradition Cases Jun. 1 through Aug. 31, 2008
[170] See 11 reports titled Closed Case Detail by DRU - Extradition Cases / PCH
[171] See 5 reports titled Closed Case Detail by DRU - Extradition Cases / RevH
[172] Hearing Decision NIC Jun. 1, 2008 – Aug. 31, 2008
[173] Closed Case Summary – NIC Referral Jun. 1, 2008 – Aug. 31, 2008
[174] *Id.*, followed by a drill down on all late occurrences to determine the times to hearing
[175] Excel spreadsheet titled Other Objections, run each month from Apr. through July 2008